Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 59 & 60

UNITED STATES, APPELLANT

vs.

CECIL RAY PRICE, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

[File Endorsement Omitted]

Criminal No. 5215

18 U.S.C. 241

UNITED STATES OF AMERICA

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, JAMES E. JORDAN, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

INDICTMENT—filed January 15, 1965

THE GRAND JURY CHARGES AND PRESENTS:

1. At all times herein mentioned Lawrence Andrew Rainey was sheriff of Neshoba County, Mississippi; Cecil Ray Price was deputy sheriff of Neshoba County, Mississippi; Richard Andrew Willis was a patrolman of the Police Department of Philadelphia, Mississippi; and each was acting by virtue of his official position and under color of the laws of the State of Mississippi.

2. Commencing on or about January 1, 1964, and continuing to on or about December 4, 1964, Cecil Ray Price, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy

Snowden, Jimmy Lee Townsend, Herman Tucker and Richard Andrew Willis, within the Southern District of Mississippi, conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

[fol. 2] 3. It was a part of the plan and purpose of the conspiracy that Cecil Ray Price, while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in his custody in the Neshoba County Jail located in Philadelphia, Mississippi, would release them from custody at such time that he, Cecil Ray Price, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Alton Wayne Roberts, Jimmy Snowden, James E. Jordan, Billy Wayne Posey, Jerry McGrew Sharpe and Jimmy Lee Townsend could and would intercept Michael Henry Schwerner, James Earl Chaney and Andrew Goodman upon their leaving the area of the Neshoba County Jail, and threaten, assault, shoot and kill them.

In violation of Section 241 of Title 18 of the United States Code.

/s/ Robert E. Hauberg
United States Attorney

/s/ Robert Owen
Special Attorney
Department of Justice

A TRUE BILL:

/s/ Dallas H. Cowan
Foreman of the Grand Jury

[fols. 3-130] * * *

[fol. 131]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal No. 5215

UNITED STATES OF AMERICA

vs

CECIL RAY PRICE ET AL

MOTION TO DISMISS INDICTMENT—filed January 25, 1965

The defendants in this cause who enter this motion by their attorneys and who are listed at the end of same, hereby move the Court to dismiss the captioned indictment and allege as grounds that the same does not charge an offense under the laws of The United States.

They further allege that this court is without jurisdiction because the offense, if any, is cognizable only in the State Courts.

As another grounds for the motion to dismiss, the defendants allege the indictment does not state facts sufficient to constitute an offense against the United States.

And defendants move for dismissal of said indictments for the reasons stated, and for the additional grounds to be shown on the hearing of this motion.

Cecil Ray Price, Bernard L. Akin, Jimmy Arledge, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis by their Attorneys; All by the undersigned of counsel:

/s/ Herman Alford

[Certificate of Service (omitted in printing)]

[fols. 132-174] * * *

[fol. 175]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal Number 5215

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

OPINION—February 24, 1965

The named defendants move to dismiss this indictment for failure to state an offense against the laws of the United States. The indictment is predicated upon 18 U.S.C.A. § 241. The first paragraph of the indictment states that Rainey was sheriff, Price was deputy sheriff and that Willis was a police officer, each acting at all times under "color of laws" of the State of Mississippi. The statute mentions nothing about "color of law" in the description of the crime embraced therein. The indictment charges that from January 1, 1964, to December 4, 1964, the named defendants in the Southern District of Mississippi conspired "to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to

the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi." The third paragraph of the indictment states that it was the plan [fol. 176] and purpose of such conspiracy that said victims would be released by said officials from the county jail and that the individual defendants would intercept said released prisoners "and threaten, assault, shoot and kill them." This entire offense is said to have been committed in Neshoba County, State of Mississippi, in violation of said § 241.

This statute was designed and intended solely for the protection of federally created rights, not for any right merely guaranteed by the laws of the United States. This is not a statute which makes murder a federal crime under the facts and circumstances in this case. The right of every person not to be deprived of his life or liberty without due process of law is a right that existed prior to the Federal Constitution. It is a right which is protected by state laws and is merely guaranteed by the Constitution of the United States.

In *United States* v. *Cruikshank*, 92 US 588, there was an indictment under § 6 of the Enforcement Act of May 31, 1870, appearing as 16 Statute At Large 141, which is similar in many respects to § 241 here. The Court said: "The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are [fol. 177] instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.'

Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

The indictment at bar is clearly void under the holding of *Williams* v. *United States*, (5CA) 179 F.2d 644, where the Court reversed a conviction under a very similar indictment in this circuit. That opinion makes abundantly clear the infirmities which are inherent in the indictment here. That decision was rendered on January 10, 1950.

On April 23, 1951, in *United States* v. *Williams*, 341 US 70; 71 S.Ct. 581, the Supreme Court of the United States affirmed that decision. Among other things, the Supreme Court in that case said: "All the evidence points to the same conclusion: that § 241 applies only to interference with rights which arise from the relation of the victim and the federal government, and not to interference [fol. 178] by state officers with rights which the federal government merely guarantees from abridgment by the states. * * * Nor does the defined crime have as an ingredient that the conspiracy be under color of State law. Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms. We therefore hold that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgment by the States. Since under this interpretation of the statute the indictment must fall, the judgment of the court below is affirmed."

The Congress has known of that decision now for approximately fifteen years and has acquiesced therein as a proper construction of § 241.

Here we have fourteen private individuals and three officials as defendants. The defendants are not charged with the violation of any right which was conferred upon either of these victims by a federal law. It is of no consequence, therefore, in law that some of the defendants were officials and that some of them were merely private citizens in allegedly committing the offense charged. The motion, like a demurer of old, admits for the purpose of this hearing all matters and things well pled in the indictment, but contends that even so, they are not charged with an offense against the United States. The authorities cited and found upon independent research support the soundness of this position. The indictment surely states a heinous crime against the State of Mississippi, but not a crime against the United States. This is a court of [fol. 179] limited jurisdiction. The United States has no common law. Section 241 must be and is the sole and exclusive exponent of the offense set forth in this indictment. The indictment simply does not charge either of these defendants with any offense against the laws of the United States. The motions to dismiss this indictment against the named defendants will, therefore, be sustained.

There are several other motions presented by these defendants pursuant to a previous order of this Court, but action on such motions is unnecessary by reason of the disposition of the foregoing motions. Such other motions, therefore may be withdrawn or will be overruled. A judgment accordingly may be presented.

/s/ Harold Cox
United States District Judge

February 24, 1965

[fol. 180]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal Number 5215

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

JUDGMENT—March 2, 1965

In accordance with the opinion in this cause entered on February 24, 1965, it is Ordered and Adjudged that:

The motions of the defendants to dismiss the indictment in this cause on the grounds that it does not state an offense against the laws of the United States is sustained, and

It is further Ordered that the indictment in this cause be and the same is hereby dismissed.

It is further Ordered that pursuant to a request of the defendants, all other motions filed in this cause be and the same are hereby permitted to be withdrawn.

ORDERED this the 2nd day of March, 1965.

/s/ Harold Cox
United States District Judge

[fol. 181]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal No. 5215

UNITED STATES OF AMERICA

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed March 2, 1965

I. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order entered in this action on March 2, 1965, dismissing the indictment under 18 U.S.C. 241.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the entire record below.

III. The following question is presented by this appeal:

[fol. 182] Whether the indictment herein charges an offense punishable under 18 U.S.C. 241.

/s/ John Doar
Acting Assistant Attorney General

/s/ Robert E. Hauberg
United States Attorney

[fol. 1a]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal No. 5216

18 U.S.C. 242, 371

UNITED STATES OF AMERICA

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, JAMES E. JORDAN, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

INDICTMENT—filed January 15, 1965

THE GRAND JURY CHARGES AND PRESENTS:

FIRST COUNT

1. At all times herein mentioned Lawrence Andrew Rainey was sheriff of Neshoba County, Mississippi; Cecil Ray Price was deputy sheriff of Neshoba County, Mississippi; Richard Andrew Willis was a patrolman of the Police Department of Philadelphia, Mississippi; and each was acting by virtue of his official position and under color of the laws of the State of Mississippi.

2. Commencing on or about January 1, 1964, and continuing to on or about December 4, 1964, Cecil Ray Price, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray

Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Showden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis, within the Southern District of Mississippi, conspired together, with each other, and with other persons to the Grand Jury unknown, to commit an offense against the United States in violation of Section 242 of Title 18 of the United States Code, that is to say that they conspired to wilfully subject Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each an inhabitant of the State of Mississippi, to the [fol. 2a] deprivation of their right, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi.

3. It was a part of the plan and purpose of the conspiracy that Cecil Ray Price, while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in custody in the Neshoba County Jail located in Philadelphia, Mississippi, would release them from custody at such time that he, Cecil Ray Price, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Alton Wayne Roberts, Jimmy Showden, James E. Jordan, Billy Wayne Posey, Jerry McGrew Sharpe and Jimmy Lee Townsend could and would intercept Michael Henry Schwerner, James Earl Chaney and Andrew Goodman upon their leaving the area of the Neshoba County Jail, and threaten, assault, shoot and kill them.

Overt Acts

Pursuant to the conspiracy and in furtherance of the objects thereof, the following defendants committed the following overt acts within the Southern District of Mississippi:

1. On June 21, 1964, Cecil Ray Price detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County Jail located in Philadelphia, Mississippi, after sundown on that day until approximately 10:30 p.m.

2. On June 21, 1964, Billy Wayne Posey drove an automobile south on Highway 19 from Philadelphia, Mississippi,

3. On June 21, 1964, Cecil Ray Price drove an automobile south on Highway 19 from Philadelphia, Mississippi.

4. On June 21, 1964, Cecil Ray Price removed Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from an automobile stopped on Highway 492 between Highway 19 and Union, Mississippi, and placed them in an official automobile of the Neshoba County Sheriff's office.

5. On June 21, 1964, Cecil Ray Price transported Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from a place on State Highway 492 between Highway 19 and Union, Mississippi, to a place on an unpaved road intersecting Highway 19 south of Philadelphia, Mississippi.

[fol. 3a] 6. On June 21, 1964, Billy Wayne Posey drove an automobile bearing the bodies of Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from a place on the unpaved road intersecting Highway 19 south of Philadelphia, Mississippi, to the vicinity of the construction site of an earthen dam, located near Highway 21, approximately 5 miles southwest of Philadelphia, Mississippi.

In violation of Section 371 of Title 18 of the United States Code.

SECOND COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws

of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

THIRD COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Nesoba County, [fol. 4a] Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill James Earl Chaney, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing James Earl Chaney summarily and without

due process of law and for the purpose and with the intent of punishing James Earl Chaney for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive James Earl Chaney of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

FOURTH COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi did wilfully assault, shoot and kill Andrew Goodman, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Andrew Goodman summarily and without due process of law and for the purpose and with the intent of punishing [fol. 5a] Andrew Goodman for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Andrew Goodman of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be de-

prived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

.....
United States Attorney

.....
Special Attorney
Department of Justice

A TRUE BILL:

.....
Foreman of the Grand Jury

[fols. 6a-91a] * * *

[fol. 92a]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Number 5216

UNITED STATES OF AMERICA

vs

CECIL RAY PRICE, ET AL

MOTION TO DISMISS INDICTMENT—filed January 25, 1965

The defendants in this cause who enter this Motion by their Attorneys and who are listed at the end of same, hereby move the court to dismiss the captioned indictment and allege as grounds that the same does not charge an offense under the laws of The United States.

They further allege that this court is without jurisdiction because the offense, if any, is cognizable only in the State Courts.

As another grounds for the Motion to dismiss, the defendants allege the indictment does not state facts sufficient to constitute an offense against The United States.

And defendants move for dismissal of said indictments for the reasons stated, and for the additional grounds to be shown on the hearing of this Motion.

Cecil Ray Price, Bernard L. Akin, Jimmy Arledge, Travis Maryn Barnett, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharp, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis by their Attorneys; All by the undersigned of counsel:

/s/ Herman Alford

[Certificate of Service (omitted in printing)]

[fols. 93a-139a] * * *

[fol. 140a]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal Number 5216

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, ET AL, DEFENDANTS

OPINION—February 25, 1965

On January 18, 1965, the defendants were ordered to file all motions to be filed herein on or before January 25, 1965. Those motions have been filed and presented and will be presently decided.

1. The defendants move for sixty days additional time to prepare and file motions and supporting affidavits. That motion is without merit and will be overruled.

2. The defendants move to dismiss the indictment because of widespread adverse publicity and because they were photographed and pictured through the news media of the country as criminals. There was, indeed, a great amount of sensational writing and numerous pictures of these defendants which appeared in many of the newspapers within the state and on television stations within the state and in other states. This unusual circumstance was taken into account by the Court in its supplemental charge to the grand jury who were expressly instructed to completely disregard all news stories and all clamor from the outside, and to fairly and justly and honestly decide, each for himself, solely from the evidence and testimony presented to them in the grand jury room as to whether or not probable cause existed for indictment. The grand jury was admonished to vote their own honest [fol. 141a] and sincere and conscientious convictions on that question solely from the evidence and testimony be-

fore them under oath in the grand jury room. This was a very intelligent and a very fine grand jury, composed of a good cross section of citizens from the entire Southern Judicial District of Mississippi. It must be and is presumed that they did their duty in accordance with those instructions. That some others throughout the district may have formed an impression of some kind of guilt or innocence of these defendants does not show any prejudice in the mind or on the part of these grand jurors in performing their official duties here. That motion is without merit and will be overruled.

3. The defendants (except Jordan) move to dismiss the indictment for failure to state an offense against, or a violation of any laws of the United States. The indictment is in four counts. The first count is for the conspriacy under 18 U.S.C.A. § 371 to violate 18 U.S.C.A. § 242. Six overt acts in furtherance of such conspiracy are stated. The second, third and fourth counts charge all of the defendants with a violation of 18 U.S.C.A. § 242. Lawrence Andrew Rainey was sheriff, Cecil Ray Price was deputy sheriff and Richard Andrew Willis was a police officer of the municipality at all material times. The other defendants were at all times private individuals and so acting. Surely, Section 242 was a valid law of the United States at such time. The indictment states and the motion for its purpose admits that two or more of them conspired to violate this law of the United States on this occasion. It is immaterial to the conspiracy that these private individuals were not acting under color of law at such time so as to be vulnerable to § 242. They are not charged with having violated § 242 but are charged with having conspired to violate said act. That [fol.142a] is a crime against the United States under § 371. The second, third and fourth counts charge that the official defendants willfully did things that denied and deprived their alleged victims of federally created rights. It is charged that the individual defendants like wise participated in the offenses charged in the second, third and fourth counts of the indictment, but it is not charged as an ultimate fact that they (or either of them) did anything as an official under color of any law, statute,

ordinance, regulation, or custom as § 242 provides and as a violation thereof would require. The indictment states that three of the defendants were acting as officers in all that they did, but then does not state or indicate that any of the other individual defendants were officers in fact, or defacto in anything allegedly done by them "under color of law."

It is accordingly the view of this Court that the first count of this indictment is valid against all defendants before the Court; that the second count is valid against Rainey, Price and Willis but not against the other defendants; that the third count is valid against Rainey, Price and Willis but not against the other defendants; and that the fourth count is valid against defendants Rainey, Price and Willis but not the other defendants upon the authorities presently cited.

In *Williams* v. *United States*, (5CA) 179 F.2d 656, a private detective was indicted and convicted under § 242 for applying third degree methods to a victim while investigating a theft from a private concern. A city policeman was present at the scene of the offense and lent color of law to the event. The detective held a card from the [fol. 143a] Director of Public Safety showing his appointment as a special police officer of the municipality. A section of the charter of the city provided that no person should be appointed a special police or detective, except under the direction of the Chief of Police for a specified time. There was substantial evidence that Williams impersonated an officer and acted under color of law. He was found guilty of the charge by a jury and his conviction was affirmed. The case was appealed to the Supreme Court of the United States where it was affirmed. The Supreme Court on appeal in *Williams* v. *United States*, 341 US 97; 71 S.Ct. 576, observed that the indictment charged that petitioner acting under color of law used force to make each victim confess to his guilt and implicate others and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of that state. The Court quoted from Count 2 of the indictment which charged violation of the Fourteenth

Amendment rights as follows: "The right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said state, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida." The trial judge admonished the jury that the [fol. 144a] defendants were "not here on trial for a violation of any law of the State of Florida for assault" nor "for assault under any laws of the United States." The Supreme Court thus affirmed said conviction and approved such application and use of § 242 to those facts and circumstances. It is thus made crystal clear that the defendants in this case who were officers and were allegedly acting willfully under color of law as charged in the indictment are vulnerable to the offense charged in § 242. To same effect is *United States* v. *Jones*, (5CA) 207 F.2d 785. Likewise in *Koehler* v. *United States*, (5CA) 189 F. 2d 711, the Court affirmed a conviction of a constable and his co-worker who violated § 242 by the violating of federal rights of a victim under color of law. In that case Ackerman was not a mere private citizen but was a deputy or assistant on duty in all that was done in violation of § 242. The motion to dismiss thus admits all things well pled in the indictment and results in the inescapable conclusion that the county and city officials who are defendants are legally charged with a violation of § 242 in this indictment.

In *Brown* v. *United States*, (6CA) 204 F.2d 247, Brown was convicted of violating 18 U.S.C. § 371. The appellant was charged with violation of § 242 but such charges against him were dismissed by the Court because he was a private individual and not an officer acting under color of law as in *Commonwealth of Virginia* v. *Rives*, 100 US 313; *United States* v. *Cruikshanks*, 92 US

542; *Screws* v. *United States*, 325 US 110, 65 S.Ct. 1039. The Court said:

[fol. 145a] "The district court dismissed the substantive counts which charged appellant with violating § 242 but submitted the conspiracy count to the jury. This action was clearly correct. * * * The fact that appellant was a private citizen and legally incapable of violating § 242 does not render him immune from a charge of violating 18 U.S.C. § 371 by engaging in an agreement with a law enforcement officer acting under color of state law to violate 18 U.S.C. § 242. *United States* v. *Holte*, 236 US 140; 35 S.Ct. 271, 59 L.Ed. 504. As declared in *Chadwick* v. *United States*, 6 Cir., 141 F. 225, at page 237, opinion by Judge Lurton: 'It is sufficient if any one of the parties to a conspiracy is legally capable of committing the offense, although the other parties may not have been.' As was stated in *United States* v. *Trierweiler*, D.C., 52 F.Supp. 4, at page 7:

> 'It is immaterial that they themselves may not have had the capacity to violate the statute for they became liable criminally if they conspired to violate that statute and if one or more of their fellow conspirators had the capacity to commit the substantive offense.' *Barron* v. *United States*, 1 Cir., 5 F.2d 799, 801, 802; *Haggerty* v. *United States*, 7 Cir., 5 F.2d 224, 225; *Kaufman* v. *United States*, 2 Cir., 212 F. 613, 618.

[fol. 146a] In accord with this conclusion are *Koehler* v. *United States*, 5 Cir., 189 F.2d 711; *Apodaca* v. *United States*, 10 Cir., 188 F.2d 932."

As the Court said in *United States* v. *Rabinowich*, 238 US 78; 35 S.Ct. 682: "That a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson*, 127 US 540; 8 S.Ct. 1301." The Court further said: "A person may be guilty of conspiring, although incappable of commiting the objective offense."

It is accordingly the view of the Court that the first count of this indictment is valid against all defendants;

that as to the remaining counts in the indictment, all of them are valid against the official defendants, but invalid against the private individual defendants therein. The motion to dismiss the indictment will thus be sustained in part and overruled in part as indicated.

4. Burrage moves and Price, Akin, Killen, Posey, Rainey, Roberts, Sharpe, Townsend, Tucker and Willis join him in requesting under Criminal Rule 41(e) that the search under the warrant be adjudged unlawful, and that the property taken be adjudged to have been illegally seized without warrant, or that the warrant be adjudged insufficient on its face, or that the property seized is not described in the warrant, or that there was no probable cause for the issuance of the warrant or that the warrant was illegally executed. Evidence was ad- [fol. 147a] duced before the Court on this motion. The contentions and the evidence somewhat overran the bounds of the motion. Some nebulous testimony before the Court was to the effect that government agents with permission had been on open land searching for some clue to the whereabouts of three human bodies. No search was made of any improvements on the "Jolly lands" now belonging to Burrage. No case of an unreasonable search or seizure is shown. Much of the description in the affidavit and warrant is void but the description of the premises known as the "Old Jolly Farm" under control of Olen Burrage in the north half of Neshoba County in the Southern District of Mississippi is sufficient for all purposes. The objects of the search were sufficiently stated. The affidavit of an FBI agent sufficiently set forth grounds for probable cause which were effectually adjudicated to exist by the issuance of the subsequent warrant. *Hester* v. *United States*, 265 U.S. 57; 44 S.Ct. 445. *Monnette* v. *United States*, (5CA) 299 F.2d 847. The search warrant described the premises to be searched as the "Old Jolly Farm" under control of Olen Burrage. This place consisted of two hundred fifty acres. It had formerly been owned by Jolly and was the only place of such kind in the county under control of Burrage. The description of the premises to be searched was sufficiently clear to enable an officer with reasonable effort to ascer-

tain and identify the place to be searched. That is the rule and the test. The warrant clearly stated that the search was for the bodies of the three identified victims. This warrant was served at 8:12 A.M., August 4, 1964, according to FBI agents' testimony supported by memoranda made at the same moment as an official record. The Court believes from the evidence that the government agents acted with full authority under this warrant in [fol. 148a] doing all that was done on said date toward searching for and discovering these bodies. This evidence was not illegally obtained and the process therefor was valid. This motion to suppress is without merit and will be overruled.

5. The defendants move for a production of evidence under Criminal Rule 16. The two motions seek material to which they are not entitled under this rule. The motion does not bring the request within the ambit of the rule. The motions will be overruled.

6. The defendants seek a bill of particulars under Criminal Rule 7(f). An indictment is required by Criminal Rule 7(c) to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy. In *Wong Tai* v. *United States*, 47 S.Ct. 300, it is said: "In charging such a conspiracy certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, it is all that is necessary." There the defendants sought as here to discover the government's evidence to which the Court said that the defendants were not entitled. A defendant in a criminal case may not resort to a motion for a bill of particulars as a discovery device. In *Van Liew* v. *United States*, 321 F.2d 664, the Court in this circuit said that it is not the office of a bill of particulars to ascertain what offense is charged. In *Johnson* v. *United States*, 207 F.2d 314, the Court in this circuit said: "The government should not be compelled by a bill of particulars to give a detailed dis- [fol. 149a] closure of its evidence, as would have been required by compliance with the motion." The indictment here contains a sufficiently definite written statement of

the offense to enable the defendants to properly and fairly present their defense thereto. It is likewise sufficiently definite and clear to forestall any possibility of double jeopardy. The motion is without merit and will be overruled.

7. Numerous motions are presented by the defendants for a severance under Criminal Rule 14. Criminal Rule 8 authorizes the joinder of offenses and of defendants under stated circumstances. Criminal Rule 14 vests the Court with a sound judicial discretion to grant such relief as may be necessary in any case to assure a fair trial for each defendant. *Opper* v. *United States*, 75 S.Ct. 158. Nothing has been presented to the Court to convince it that a severance of any other defendants, other than Horace Doyle Barnette who has already been severed from this proceeding, is necessary in this case. But under the circumstances it would appear to be fair and just that all of the defendants be first tried under the first count of this indictment in Case No. 5216, and that the trial of the official defendants under Count 2, Count 3 and Count 4 should be next tried. The motion will thus be sustained in part and overruled in part as indicated.

8. The defendants by separate motions request a trial by jury. Those motions will be sustained.

A judgment disposing of said motions as indicated may be presented for entry.

February 25, 1965

/s/ Harold Cox
United States District Judge

[fol. 150a]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal Number 5216

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

JUDGMENT—March 2, 1965

In accordance with the opinion in this cause entered on February 25, 1965, it is ORDERED and ADJUDGED that:

(1) The defendants motions for sixty days additional time to prepare and file motions and supporting affidavits be and the same are hereby denied.

(2) The defendants motions to dismiss the indictment on the grounds of widespread adverse publicity in the news media picturing them as criminals be and the same are hereby denied.

[fol. 151a] (3) The motions to dismiss the indictment by the defendants Cecil Ray Price, Lawrence Andrew Rainey and Richard Andrew Willis on the grounds that it fails to state an offense against the laws of the United States be and the same are hereby denied.

(4) The motions of the defendants to dismiss the indictment for failure to state an offense against the laws

of the United States be and the same are hereby denied as to the first count of the indictment charging a violation of 18 U.S.C. 371.

(5) The motions of the defendants Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker to dismiss the indictment for failure to state an offense against the laws of the United States be and the same are hereby granted as to the second, third and fourth counts of the indictment charging violations of 18 U.S.C. 242, and count 2, count 3, and count 4 of the indictment be and the same are hereby dismissed as to defendants Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker.

[fol. 152a] (6) The motion of defendant Olen Burrage, adjoined by the other defendants, to suppress evidence obtained from property under his control on the grounds that the warrant was unlawful, that the property was illegally seized without warrant, that the warrant was insufficient on its face and did not describe the property to be searched, and that there was no probable cause for issuance of the warrant, be and the same is hereby denied.

(7) The motions of the defendants for production of evidence under Rule 16, Rules of Criminal Procedure be and the same are hereby denied.

(8) The motions of the defendants for bill of particulars under Rule 7f of the Rules of Criminal Procedure be and the same are hereby denied.

(9) The motions of the defendants for severance under Rule 14, Rules of Criminal Procedure be and the same are hereby denied, except as hereinafter stated.

(10) The motions of the defendants for trial by jury are hereby granted.

It is further ordered that Count 1 of this indictment shall be tried separately from Count 2, Count 3 and Count 4, and that Count 1 shall be tried first.

ORDERED this March 2nd 1965.

/s/ Harold Cox
United States District Judge

[fol. 153a]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

[File Endorsement Omitted]

Criminal No. 5216

UNITED STATES OF AMERICA

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed March 2, 1965

I. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order entered in this action on March 2nd 1965, dismissing the

second, third and fourth counts of the indictment under 18 U.S.C. 242 as to Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, and Herman Tucker.

This appeal is taken pursuant to 18 U.S.C. 3731.

[fol. 154a] II. The clerk will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the entire record below.

II. The following question is presented by this appeal:

Whether the second, third and fourth counts of the indictment, insofar as they include persons not officials of the State, charge offenses punishable under 18 U.S.C. 242.

/s/ John Doar, Acting
Assistant Attorney General

/s/ Robert E. Hauberg
United States Attorney

[fol. 155a]

SUPREME COURT OF THE UNITED STATES

Nos. 948 & 949, October Term, 1964

UNITED STATES, APPELLANT

v.

CECIL RAY PRICE, ET AL.

APPEALS from the United States District Court for the Southern District of Mississippi.

ORDER POSTPONING JURISDICTION—April 26, 1965

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of these cases on the merits.

It is further ordered that the motion to consolidate these cases is granted and a total of two hours is allotted for oral argument.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

Nos. —, —

UNITED STATES OF AMERICA, APPELLANT

v.

CECIL RAY PRICE, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

JURISDICTIONAL STATEMENT; MOTION TO CONSOLIDATE APPEALS; MOTION FOR EXPEDITED HEARING

OPINIONS BELOW

The opinions of the district court (Appendices A and B, *infra*, pp. 11–25) are not yet reported.

JURISDICTION

The judgments of the district court dismissing one indictment in its entirety as to all appellees (Appendix C, *infra*, p. 26) and three counts of a second indictment as to fourteen of the appellees (Appendix D, *infra*, p. 27) were entered on March 2, 1965. Notices of appeal to this Court were filed on the same day. The jurisdiction of this Court to review the decision of the district court on direct appeal is

conferred by 18 U.S.C. 3731. *United States* v. *Braverman*, 373 U.S. 405.

STATUTES INVOLVED.

18 U.S.C. 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, com-

mands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

QUESTIONS PRESENTED

1. Whether the right secured by the Fourteenth Amendment, not to be deprived of life or liberty without due process of law by persons acting under color of State law, is a "right or privilege secured * * * by the Constitution" within the meaning of Section 241 of the Criminal Code.

2. Whether Sections 242 and 2 of the Criminal Code reach conduct by persons not officials of the State who act under color of State law and in association with State officials.

STATEMENT

On January 15, 1965, the United States Grand Jury for the Southern District of Mississippi returned two indictments,[1] each charging the same eighteen persons [2] with offenses against the civil rights of Schwerner, Chaney and Goodman, who were killed during the summer of 1964 in the vicinity of Philadelphia, Mississippi. Three of the defendants (Rainey, Price and

[1] The full text of the indictments is reproduced in Appendices E and F, *infra*, pp. 30–39.

[2] James E. Jordan, one of the defendants charged in the two indictments, was not before the district court and is not involved in the rulings below or the present appeals. His case was transferred to the United States District Court for the Middle District of Georgia under Rule 20, F.R. Cr. P.

Willis) were alleged to be State law enforcement officers then "acting by virtue of [their] official positions and under color of the laws of the State of Mississippi." There is no claim that the remaining defendants held public office.

1. The first indictment (App. E, *infra*, p. 30)—the predicate of Criminal Action Number 5215—contained a single count charging all the defendants with a criminal conspiracy in violation of 18 U.S.C. 241. It alleged that, between stated dates in 1964, the eighteen named persons—

> * * * conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

The indictment further alleged the means by which the defendants planned to achieve the objects of their conspiracy.

The district court dismissed the indictment in its entirety, as to all defendants, on the ground that it did not state an offense against the United States (App. A, *infra*, p. 11). Invoking an alternative ground of the ruling in *Williams* v. *United States*, 179 F. 2d 644 (C.A. 5), affirmed in part on other grounds, 341 U.S. 70, the court held that Section 241

of the Criminal Code vindicates only "federally created rights", which do not include the Fourteenth Amendment right set forth in the indictment (App. A, *infra*, 12–14).

2. The indictment in Criminal Case Number 5216 is in four counts, each of which names all eighteen defendants (App. F, *infra*, p. 33). Count 1—which was sustained as to all defendants and is not in issue here—charges a violation of 18 U.S.C. 371 by conspiring to commit offenses defined in 18 U.S.C. 242. The allegations are similar to those set forth in the indictment laid under 18 U.S.C. 241. The present appeal is directed to the partial dismissal of Counts 2, 3 and 4, which charge substantive violations of Section 242.

The three substantive counts are identical, except that each involves a different victim. Thus, Count 2 charges that the several defendants—

> * * * while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due

process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense, and if found guilty, to be punished in accordance with the laws of the State of Mississippi.

The district court sustained motions to dismiss Counts 2, 3 and 4 as to all the private defendants (while denying similar motions with respect to the three defendants who are law enforcement officers) (App. B, *infra*, p. 16). The court read Section 242 as reaching only the acts of public officers while acting officially. It deemed insufficient the allegation of the indictment that the defendants who were not State officials were nevertheless "acting under color of the laws of the State of Mississippi" and rejected the suggestion that they were amenable to Section 242 as aiders and abettors of public officials with whom it was alleged they were jointly participating. In the court's view, no offense was stated against the private defendants because it was "not charged as an ultimate fact that [any of them] did anything as an official" or that the "individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'" (App. B, *infra*, p. 18).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The first issue is whether Section 241 of the Criminal Code encompasses Fourteenth Amendment rights. The importance of the question is not de-

batable. It was left unresolved by an evenly divided Court in *Williams* v. *United States*, 341 U.S. 70. Since Section 241 is the only federal statute which carries severe punishment for brutal physical violence in the invasion of civil rights, its scope is a matter of grave concern. Both the Executive Branch and the Congress need a definitive interpretation before determining the need for additional legislation.

In our view, 18 U.S.C. 241 encompasses rights secured by the Reconstruction Amendments. That seems to us the most natural reading of the text. It is, moreover, a fair inference that the provision, originally enacted in 1870 (16 Stat. 140) was intended to implement the new guarantees then recently incorporated into the Constitution. Finally, as the opinion of Mr. Justice Douglas in *Williams* demonstrates (see 341 U.S. at 90–93), that conclusion finds support in the legislative history of the section and early lower court decisions.

2. The other question presented is also important. In effect, the district court ruled that private persons without official status as State officers are never amenable to Section 242 of the Criminal Code—albeit they are intimately involved in the crimes of officials and are alleged themselves to be acting "under color of State law." That holding contradicts the express language of the "aider and abettor" statute (18 U.S.C. 2, *supra*, pp. 2–3)[3] and rejects a substantial body

[3] For the proposition that a person may be convicted of aiding and abetting despite his legal incapacity to commit the substantive offense, see *Wilson* v. *United States*, 230 F. 2d 521,

of jurisprudence dealing with the precise point. See *United States* v. *Lynch*, 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5); *Williams* v. *United States*, 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97; *Baldwin* v. *Morgan*, 251 F. 2d 780 (C.A. 5); *Koehler* v. *United States*, 189 F. 2d 711 (C.A. 5), certiorari denied, 342 U.S. 852. The decision is, we submit, plainly erroneous. At all events, the question of the reach of Section 242 when private persons are acting together with public officials (and perhaps shielded from local law by their protective umbrella) is an important one that should be definitely settled by this Court.

THE APPEALS SHOULD BE CONSOLIDATED AND THE CAUSE EXPEDITED

Both appeals involve indictments arising out of the same course of conduct and are taken from judgments contemporaneously entered by the same district court. All of the appellees in the case arising under 18 U.S.C. 242 are also appellees in the case arising under 18 U.S.C. 241. We accordingly move that the two appeals be consolidated.

This case, as the members of the Court and, indeed, the entire country are aware, is one of extraordinary gravity and intrinsic importance. The public interest requires the prompt disposition of all the

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526 (C.A. 4) certiorari denied, 351 U.S. 931; *Haggerty* v. *United States*, 5 F. 2d 224 (C.A. 7); *Koehler* v. *United States*, 189 F. 2d 711 (C.A. 5), certiorari denied, 342 U.S. 852, *United States* v. *Melekh*, 193 F. Supp. 586, 592 (N.D. Ill.); *Swanne Soon Young Pang* v. *United States*, 209 F. 2d 245, 246 (C.A. 9); *United States* v. *Snyder*, 14 Fed. 554 (C.C.D. Minn.); see, also *Coffin* v. *United States*, 162 U.S. 664, and *id.*, 156 U.S. 432.

charges. Their prompt disposition, in accordance with the justice of the cause, depends upon the availability and recollection of key witnesses, either of which might be adversely affected by any substantial delay. The conspiracy count of the indictment involving 18 U.S.C. 242 remains for trial against all the defendants and the substantive counts have been sustained against some of the appellees. Even if no questions of double jeopardy or *res judicata* were precipitated, it would be wasteful to proceed to trial on the merits on those lesser charges while the appeal of the felony indictment was pending here and then, upon reversal, to prosecute the more serious charges in a separate trial.

In the circumstances, we believe that it would be damaging to the administration of justice if the hearing of this cause were postponed to the next term of Court. It also seems apparent that appelles can have no legitimate interest in a delay of this Court's determination of the validity of the indictments. We therefore move that this cause be expedited for hearing at the present Term.

To this end, we also move that appellees be requested to file a response to this paper on or before March 10, 1965. That would permit the Court to determine its probable jurisdiction and act upon the motions set forth above on March 15, 1965. If probable jurisdiction is then noted and the government's motion for expedition granted, we propose, subject to the convenience of the Court, a briefing and argument schedule as follows:

Appellant's brief to be filed on April 5, 1965;[4]

Appellees' brief to be filed on April 25, 1965;

The cause to be set for argument on May 3, 1965 (the first open date following the conclusion of the Court's regularly scheduled hearings).

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted, the appeals herein consolidated and the cause expedited for hearing.

ARCHIBALD COX,
Solicitor General,
JOHN DOAR,
Acting Assistant Attorney General,
RALPH S. SPRITZER,
LOUIS F. CLAIBORNE,
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Attorneys.

MARCH 1965.

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[4] In view of the somewhat accelerated briefing schedule, we suggest that the parties be granted leave to file their briefs initially in typescript or mimeographed form and to substitute printed copies promptly thereafter.

APPENDIX A

United States District Court
Southern District of Mississippi
Eastern Division

Criminal Number 5215

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

The named defendants move to dismiss this indictment for failure to state an offense against the laws of the United States. The indictment is predicated upon 18 U.S.C.A. § 241. The first paargraph of the indictment states that Rainey was sheriff, Price was deputy sheriff and that Willis was a police officer, each acting at all times under "color of laws" of the State of Mississippi. The statute mentions nothing about "color of law" in the description of the crime embraced therein. The indictment charges that from January 1, 1964, to December 4, 1964, the named defendants in the Southern District of Mississippi con-

spired "to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi." The third paragraph of the indictment states that it was the plan and purpose of such conspiracy that said victims would be released by said officials from the county jail and that the individual defendants would intercept said released prisoners "and threaten, assault, shoot and kill them." This entire offense is said to have been committed in Neshoba County, State of Mississippi, in violation of said § 241.

This statute was designed and intended solely for the protection of federally created rights, not for any right merely guaranteed by the laws of the United States. This is not a statute which makes murder a federal crime under the facts and circumstances in this case. The right of every person not to be deprived of his life or liberty without due process of law is a right that existed prior to the Federal Constitution. It is a right which is protected by state laws and is merely guaranteed by the Constitution of the United States.

In *United States* v. *Cruikshank,* 92 U.S. 588, there was an indictment under § 6 of the Enforcement Act of May 31, 1870, appearing as 16 Statute At Large 141, which is similar in many respects to § 241 here. The Court said: "The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and

liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

"The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

The indictment at bar is clearly void under the holding of *Williams* v. *United States,* (5 CA) 179 F. 2d 644, where the Court reversed a conviction under a very similar indictment in this circuit. That opinion makes abundantly clear the infirmities which are inherent in the indictment here. That decision was rendered on January 10, 1950.

On April 23, 1951, in *United States* v. *Williams,* 341 U.S. 70; 71 S. Ct. 581, the Supreme Court of the

United States affirmed that decision. Among other things, the Supreme Court in that case said: "All the evidence points to the same conclusion: that § 241 applies only to interference with rights which arise from the relation of the victim and the federal government, and not to interference by state officers with rights which the federal government merely guarantees from abridgment by the states. * * * Nor does the defined crime have as an ingredient that the conspiracy be under color of State law. Criminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms. We therefore hold that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgment by the States. Since under this interpretation of the statute the indictment must fall, the judgment of the court below is affirmed."

The Congress has known of that decision now for approximately fifteen years and has acquiesced therein as a proper construction of § 241.

Here we have fourteen private individuals and three officials as defendants. The defendants are not charged with the violation of any right which was conferred upon either of these victims by a federal law. It is of no consequence, therefore, in law that some of the defendants were officials and that some of them were merely private citizens in allegedly committing the offense charged. The motion, like a demurer of old, admits for the purpose of this hearing all matters and things well pled in the indictment, but contends that even so, they are not charged with an offense against the United States. The authorities

cited and found upon independent research support the soundness of this position. The indictment surely states a heinous crime against the State of Mississippi, but not a crime against the United States. This is a court of limited jurisdiction. The United States has no common law. Section 241 must be and is the sole and exclusive exponent of the offense set forth in this indictment. The indictment simply does not charge either of these defendants with any offense against the laws of the United States. The motions to dismiss this indictment against the named defendants will, therefore, be sustained.

There are several other motions presented by these defendants pursuant to a previous order of this Court, but action on such motions is unnecessary by reason of the disposition of the foregoing motions. Such other motions, therefore, may be withdrawn or will be overruled. A judgment accordingly may be presented.

HAROLD COX,
United States District Judge.

FEBRUARY 24, 1965.

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APPENDIX B

United States District Court
Southern District of Mississippi
Eastern Division

Criminal Number 5216

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, ET AL., DEFENDANTS

On January 18, 1965, the defendants were ordered to file all motions to be filed herein on or before January 25, 1965. Those motions have been filed and presented and will be presently decided.

1. The defendants move for sixty days additional time to prepare and file motions and supporting affidavits. That motion is without merit and will be overruled.

2. The defendants move to dismiss the indictment because of widespread adverse publicity and because they were photographed and pictured through the news media of the country as criminals. There was, indeed, a great amount of sensational writing and numerous pictures of these defendants which appeared in many of the newspapers within the state and on television stations within the state and in other states. This unusual circumstance was taken into account by the Court in its supplemental charge to the grand jury who were expressly instructed to com-

pletely disregard all news stories and all clamor from the outside, and to fairly and justly and honestly decide, each for himself, solely from the evidence and testimony presented to them in the grand jury room as to whether or not probable cause existed for indictment. The grand jury was admonished to vote their own honest and sincere and conscientious convictions on that question solely from the evidence and testimony before them under oath in the grand jury room. This was a very intelligent and a very fine grand jury, composed of a good cross section of citizens from the entire Southern Judicial District of Mississippi. It must be and is presumed that they did their duty in accordance with those instructions. That some others throughout the district may have formed an impression of some kind of guilt or innocence of these defendants does not show any prejudice in the mind or on the part of these grand jurors in performing their official duties here. That motion is without merit and will be overruled.

3. The defendants (except Jordan) move to dismiss the indictment for failure to state an offense against, or a violation of any laws of the United States. The indictment is in four counts. The first count is for the conspiracy under 18 U.S.C.A. § 371 to violate 18 U.S.C.A. § 242. Six overt acts in furtherance of such conspiracy are stated. The second, third and fourth counts charge all of the defendants with a violation of 18 U.S.C.A. § 242. Lawrence Andrew Rainey was sheriff, Cecil Ray Price was deputy sheriff and Richard Andrew Willis was a police officer of the municipality at all material times. The other defendants were at all times private individuals and so acting. Surely, Section 242 was a valid law of the United States at such time. The indictment states and the motion for its purpose admits that two or more of

them conspired to violate this law of the United States on this occasion. It is immaterial to the conspiracy that these private individuals were not acting under color of law at such time so as to be vulnerable to § 242. They are not charged with having violated § 242 but are charged with having conspired to violate said act. That is a crime against the United States under § 371. The second, third and fourth counts charge that the official defendants willfully did things that denied and deprived their alleged victims of federally created rights. It is charged that the individual defendants likewise participated in the offenses charged in the second, third and fourth counts of the indictment, but it is not charged as an ultimate fact that they (or either of them) did anything as an official under color of any law, statute, ordinance, regulation, or custom as § 242 provides and as a violation thereof would require. The indictment states that three of the defendants were acting as officers in all that they did, but then does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them "under color of law."

It is accordingly the view of this Court that the first count of this indictment is valid against all defendants before the Court; that the second count is valid against Rainey, Price and Willis but not against the other defendants; that the third count is valid against Rainey, Price and Willis but not against the other defendants; and that the fourth count is valid against defendants Rainey, Price and Willis but not the other defendants upon the authorities presently cited.

In *Williams* v *United States,* (5 CA) 179 F. 2d 656, a private detective was indicted and convicted under § 242 for applying third degree methods to a vic-

tim while investigating a theft from a private concern. A city policeman was present at the scene of the offense and lent color of law to the event. The detective held a card from the Director of Public Safety showing his appointment as a special police officer of the municipality. A section of the charter of the city provided that no person should be appointed a special police or detective, except under the direction of the Chief of Police for a specified time. There was substantial evidence that Williams impersonated an officer and acted under color of law. He was found guilty of the charge by a jury and his conviction was affirmed. The case was appealed to the Supreme Court of the United States where it was affirmed. The Supreme Court on appeal in *Williams* v. *United States,* 341 US 97; 71 S. Ct. 576, observed that the indictment charged that petitioner acting under color of law used force to make each victim confess to his guilt and implicate others and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of that state. The Court quoted from Count 2 of the indictment which charged violation of the Fourteenth Amendment rights as follows: "The right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said state, and the right and privilege to be tried by due process of law and if

found guilty to be sentenced and punished in accordance with the laws of the State of Florida." The trial judge admonished the jury that the defendants were "not here on trial for a violation of any law of the State of Florida for assault" nor "for assault under any laws of the United States." The Supreme Court thus affirmed said conviction and approved such application and use of § 242 to those facts and circumstances. It is thus made crystal clear that the defendants in this case who were officers and were allegedly acting willfully under color of law as charged in the indictment are vulnerable to the offense charged in § 242. To same effect is *United States* v. *Jones,* (5 CA) 207 F. 2d 785. Likewise in *Koehler* v. *United States,* (5 CA) 189 F. 2d 711, the Court affirmed a conviction of a constable and his co-worker who violated § 242 by the violating of federal rights of a victim under color of law. In that case Ackerman was not a mere private citizen but was a deputy or assistant on duty in all that was done in violation of § 242. The motion to dismiss thus admits all things well pled in the indictment and results in the inescapable conclusion that the county and city officials who are defendants are legally charged with a violation of § 242 in this indictment.

In *Brown* v. *United States,* (6 CA) 204 F. 2d 247, Brown was convicted of violating 18 U.S.C. § 371. The appellant was charged with violation of § 242 but such charges against him were dismissed by the Court because he was a private individual and not an officer acting under color of law as in *Commonwealth of Virginia* v. *Rives,* 100 US 313; *United States* v. *Cruikshanks,* 92 US 542; *Screws* v. *United States,* 325 US 110, 65 S. Ct. 1039. The Court said:

> "The district court dismissed the substantive counts which charged appellant with violating § 242 but submitted the conspiracy count to the

jury. This action was clearly correct. * * * The fact that appellant was a private citizen and legally incapable of violating § 242 does not render him immune from a charge of violating 18 U.S.C. § 371 by engaging in an agreement with a law enforcement officer acting under color of state law to violate 18 U.S.C. § 242. *United States* v. *Holte,* 236 US 140; 35 S. Ct. 271, 59 L. Ed. 504. As declared in *Chadwick* v. *United States,* 6 Cir., 141 F. 225, at page 237, opinion by Judge Lurton: 'It is sufficient if any one of the parties to a conspiracy is legally capable of committing the offense, although the other parties may not have been.' As was stated in *United States* v. *Trierweiler,* D.C., 52 F. Supp. 4, at page 7:

" 'It is immaterial that they themselves may not have had the capacity to violate the statute for they became liable criminally if they conspired to violate that statute and if one or more of their fellow conspirators had the capacity to commit the substantive offense.' *Barron* v. *United States,* 1 Cir., 5 F. 2d 799, 801, 802; *Haggerty* v. *United States,* 7 Cir., 5 F. 2d 224, 225; *Kaufman* v. *United States,* 2 Cir., 212 F. 613, 618.

"In accord with this conclusion are *Koehler* v. *United States,* 5 Cir., 189 F. 2d 711; *Apodaca* v. *United States,* 10 Cir., 188 F. 2d 932."

As the Court said in *United States* v. *Rabinowich,* 238 U.S. 78; 35 S. Ct. 682: "That a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson,* 127 U.S. 540; 8 S. Ct. 1301." The Court further said: "A person may be guilty of conspiring, although incapable of committing the objective offense."

It is accordingly the view of the Court that the first count of this indictment is valid against all defendants; that as to the remaining counts in the in-

dictment, all of them are valid against the official defendants, but invalid against the private individual defendants therein. The motion to dismiss the indictment will thus be sustained in part and overruled in part as indicated.

4. Burrage moves and Price, Akin, Killen, Posey, Rainey, Roberts, Sharpe, Townsend, Tucker and Willis join him in requesting under Criminal Rule 41(e) that the search under the warrant be adjudged unlawful, and that the property taken be adjudged to have been illegally seized without warrant, or that the warrant be adjudged insufficient on its face, or that the property seized is not described in the warrant, or that there was no probable cause for the issuance of the warrant or that the warrant was illegally executed. Evidence was adduced before the Court on this motion. The contentions and the evidence somewhat overran the bounds of the motion. Some nebulous testimony before the Court was to the effect that government agents with permission had been on open land searching for some clue to the whereabouts of three human bodies. No search was made of any improvements on the "Jolly lands" now belonging to Burrage. No case of an unreasonable search or seizure is shown. Much of the description in the affidavit and warrant is void but the description of the premises known as the "Old Jolly Farm" under control of Olen Burrage in the north half of Neshoba County in the Southern District of Mississippi is sufficient for all purposes. The objects of the search were sufficiently stated. The affidavit of an FBI agent sufficiently set forth grounds for probable cause which were effectually adjudicated to exist by the issuance of the subsequent warrant. *Hester* v. *United States,* 265 U.S. 57; 44 S. Ct. 445. *Monnette* v. *United States,* (5 C.A.) 299 F. 2d 847. The search warrant

described the premises to be searched as the "Old Jolly Farm" under control of Olen Burrage. This place consisted of two hundred fifty acres. It had formerly been owned by Jolly and was the only place of such kind in the county under control of Burrage. The description of the premises to be searched was sufficiently clear to enable an officer with reasonable effort to ascertain and identify the place to be searched. That is the rule and the test. The warrant clearly stated that the search was for the bodies of the three identified victims. This warrant was served at 8:12 A.M., August 4, 1964, according to FBI agents' testimony supported by memoranda made at the same moment as an official record. The Court believes from the evidence that the government agents acted with full authority under this warrant in doing all that was done on said date toward searching for and discovering these bodies. This evidence was not illegally obtained and the process therefor was valid. This motion to suppress is without merit and will be overruled.

5. The defendants move for a production of evidence under Criminal Rule 16. The two motions seek material to which they are not entitled under this rule. The motion does not bring the request within the ambit of the rule. The motions will be overruled.

6. The defendants seek a bill of particulars under Criminal Rule 7(f). An indictment is required by Criminal Rule 7(c) to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy. In *Wong Tai* v. *United States,* 47 S. Ct. 300, it is said: "In charging such

a conspiracy certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, it is all that is necessary." There the defendants sought as here to discover the government's evidence to which the Court said that the defendants were not entitled. A defendant in a criminal case may not resort to a motion for a bill of particulars as a discovery device. In *Van Liew* v. *United States,* 321 F. 2d 664, the Court in this circuit said that it is not the office of a bill of particulars to ascertain what offense is charged. In *Johnson* v. *United States,* 207 F. 2d 314, the Court in this circuit said: "The government should not be compelled by a bill of particulars to give a detailed disclosure of its evidence, as would have been required by compliance with the motion." The indictment here contains a sufficiently definite written statement of the offense to enable the defendants to properly and fairly present their defense thereto. It is likewise sufficiently definite and clear to forestall any possibility of double jeopardy. The motion is without merit and will be overruled.

7. Numerous motions are presented by the defendants for a severance under Criminal Rule 14. Criminal Rule 8 authorizes the joinder of offenses and of defendants under stated circumstances. Criminal Rule 14 vests the Court with a sound judicial discretion to grant such relief as may be necessary in any case to assure a fair trial for each defendant. *Opper* v. *United States,* 75 S. Ct. 158. Nothing has been presented to the Court to convince it that a severance of any other defendants, other than Horace Doyle Barnette who has already been severed from this proceeding, is necessary in this case. But under the circumstances it would appear to be fair and just that all of the defendants be first tried under the first count of this indictment in Case No. 5216, and that the trial

of the official defendants under Count 2, Count 3 and Count 4 should be next tried. The motion will thus be sustained in part and overruled in part as indicated.

8. The defendants by separate motions request a trial by jury. Those motions will be sustained.

A judgment disposing of said motions as indicated may be presented for entry.

HAROLD COX,
United States District Judge.

FEBRUARY 25, 1965.

APPENDIX C

In the United States District Court for the Southern District of Mississippi Eastern Division

Criminal Number 5215

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

JUDGMENT

In accordance with the opinion in this cause entered on February 24, 1965, it is Ordered and Adjudged that:

The motions of the defendants to dismiss the indictment in this cause on the grounds that it does not state an offense against the laws of the United States is sustained, and

It is further Ordered that the indictment in this cause be and the same is hereby dismissed.

It is further Ordered that pursuant to the request of the defendants all other motions filed in this cause be and the same are hereby permitted to be withdrawn.

/s/ HAROLD COX,
United States District Judge.

MARCH 2, 1965.

APPENDIX D

In the United States District Court for the
Southern District of Mississippi
Eastern Division

Criminal Number 5216

UNITED STATES OF AMERICA, PLAINTIFF

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, EDGAR RAY KILLEN, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS, DEFENDANTS

JUDGMENT

In accordance with the opinion in this cause entered on February 25, 1965, it is ORDERED and ADJUDGED that:

(1) The defendants' motions for sixty days additional time to prepare and file motions and supporting affidavits be and the same are hereby denied.

(2) The defendants' motions to dismiss the indictment on the ground of widespread adverse publicity in the news media picturing them as criminals be and the same are hereby denied.

(3) The motions to dismiss the indictment by the defendants Cecil Ray Price, Lawrence Andrew Rainey and Richard Andrew Willis on the ground

that it fails to state an offense against the laws of the United States be and the same are hereby denied.

(4) The motions of the defendants to dismiss the indictment for failure to state an offense against the laws of the United States be and the same are hereby denied as to the first count of the indictment charging a violation of 18 U.S.C. 371.

(5) The motions of the defendants Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker to dismiss the indictment for failure to state an offense against the laws of the United States be and the same are hereby granted as to the second, third and fourth counts of the indictment charging violations of 18 U.S.C. 242, and count 2, count 3, and count 4 of the indictment be and the same are hereby dismissed as to defendants Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Burnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker.

(6) The motion of defendant Olen Burrage, joined by the other defendants, to suppress evidence obtained from property under his control on the grounds that the warrant was unlawful, that the property was illegally seized without warrant, that the warrant was insufficient on its face and did not describe the property to be searched, and that there was no probable cause for issuance of the warrant, be and the same is hereby denied.

(7) The motions of the defendants for production of evidence under Rule 16, Rules of Criminal Procedure be and the same are hereby denied.

(8) The motions of the defendants for bill of particulars under Rule 7f of the Rules of Criminal Procedure be and the same are hereby denied.

(9) The motions of the defendants for severance under Rule 14, Rules of Criminal Procedure be and the same are hereby denied, except as hereinafter stated.

(10) The motions of the defendants for trial by jury are hereby granted.

It is further Ordered that count 1 of this indictment shall be tried separately from count 2, count 3 and count 4, and that count 1 shall be tried first.

Ordered this March 2, 1965.

/s/ HAROLD COX,
United States District Judge.

APPENDIX E

In the United States District Court for the Southern District of Mississippi Eastern Division

Criminal No. 5215

18 U.S.C. 241

UNITED STATES OF AMERICA

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, JAMES E. JORDAN, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JERRY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

THE GRAND JURY CHARGES AND PRESENTS:

1. At all times herein mentioned Lawrence Andrew Rainey was sheriff of Neshoba County, Mississippi; Cecil Ray Price was deputy sheriff of Neshoba County, Mississippi; Richard Andrew Willis was a patrolman of the Police Department of Philadelphia, Mississippi; and each was acting by virtue of his official position and under color of the laws of the State of Mississippi.

2. Commencing on or about January 1, 1964, and continuing to on or about December 4, 1964, Cecil

Ray Price, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis, within the Southern District of Mississippi, conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

3. It was a part of the plan and purpose of the conspiracy that Cecil Ray Price, while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in his custody in the Neshoba County Jail located in Philadelphia, Mississippi, would release them from custody at such time that he, Cecil Ray Price, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Alton Wayne Roberts, Jimmy Snowden, James E. Jordan, Billy Wayne Posey, Jerry McGrew Sharpe and Jimmy Lee Townsend could and would intercept Michael Henry Schwerner, James Earl Chaney and Andrew Goodman upon their leaving the area of the Neshoba County Jail, and threaten, assault, shoot and kill them.

In violation of Section 241 of Title 18 of the United States Code.

/s/ ROBERT E. HAUBERG,
United States Attorney,

/s/ ROBERT OWEN,
Special Attorney,
Department of Justice.

A True Bill:
/s/ DALLAS H. COWAN,
Foreman of the Grand Jury.

APPENDIX F

In the United States District Court for the
Southern District of Mississippi
Eastern Division

Criminal No. 5216
18 U.S.C. 242, 371

UNITED STATES OF AMERICA

v.

CECIL RAY PRICE, BERNARD L. AKIN, JIMMY ARLEDGE, HORACE DOYLE BARNETTE, TRAVIS MARYN BARNETTE, OLEN LOVELL BURRAGE, JAMES T. HARRIS, FRANK J. HERNDON, JAMES E. JORDAN, EDGAR RAY KILLEN, BILLY WAYNE POSEY, LAWRENCE ANDREW RAINEY, ALTON WAYNE ROBERTS, JIMMY MCGREW SHARPE, JIMMY SNOWDEN, JIMMY LEE TOWNSEND, HERMAN TUCKER, RICHARD ANDREW WILLIS

THE GRAND JURY CHARGES AND PRESENTS:

FIRST COUNT

1. At all times herein mentioned Lawrence Andrew Rainey was sheriff of Neshoba County, Mississippi; Cecil Ray Price was deputy sheriff of Neshoba County, Mississippi; Richard Andrew Willis was a patrolman of the Police Department of Philadelphia, Mississippi; and each was acting by virtue of his official position and under color of the laws of the State of Mississippi.

2. Commencing on or about January 1, 1964, and continuing to on or about December 4, 1964, Cecil Ray Price, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Lawrence Andrew Rainey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend, Herman Tucker, and Richard Andrew Willis, within the Southern District of Mississippi, conspired together, with each other, and with other persons to the Grand Jury unknown, to commit an offense against the United States in violation of Section 242 of Title 18 of the United States Code, that is to say that they conspired to wilfully subject Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each an inhabitant of the State of Mississippi, to the deprivation of their right, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi.

3. It was a part of the plan and purpose of the conspiracy that Cecil Ray Price, while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in custody in the Neshoba County Jail located in Philadelphia, Mississippi, would release them from custody at such time that he, Cecil Ray Price, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Alton Wayne Roberts, Jimmy Snowden, James E. Jordan, Billy Wayne Posey, Jerry McGrew Sharpe and Jimmy Lee Townsend could and would intercept Michael Henry Schwerner, James Earl Chaney and Andrew Goodman upon their leaving

the area of the Neshoba County Jail, and threaten, assault, shoot and kill them.

OVERT ACTS

Pursuant to the conspiracy and in furtherance of the objects thereof, the following defendants committed the following overt acts within the Southern District of Mississippi:

1. On June 21, 1964, Cecil Ray Price detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County Jail located in Philadelphia, Mississippi, after sundown on that day until approximately 10:30 p.m.

2. On June 21, 1964, Billy Wayne Posey drove an automobile south on Highway 19 from Philadelphia, Mississippi.

3. On June 21, 1964, Cecil Ray Price drove an automobile south on Highway 19 from Philadelphia, Mississippi.

4. On June 21, 1964, Cecil Ray Price removed Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from an automobile stopped on Highway 492 between Highway 19 and Union, Mississippi, and placed them in an official automobile of the Neshoba County Sheriff's office.

5. On June 21, 1964, Cecil Ray Price transported Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from a place on State Highway 492 between Highway 19 and Union, Mississippi, to a place on an unpaved road intersecting Highway 19 south of Philadelphia, Mississippi.

6. On June 21, 1964, Billy Wayne Posey drove an automobile bearing the bodies of Michael Henry Schwerner, James Earl Chaney and Andrew Goodman from a place on the unpaved road intersecting Highway 19 south of Philadelphia, Mississippi, to

the vicinity of the construction site of an earthen dam, located near Highway 21, approximately 5 miles southwest of Philadelphia, Mississippi.

In violation of Section 371 of Title 18 of the United States Code.

SECOND COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from

summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

THIRD COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill James Earl Chaney, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing James Earl Chaney summarily and without due process of law and for the purpose and with the intent of punishing James Earl Chaney for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive James Earl Chaney of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi

and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

FOURTH COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Andrew Goodman, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Andrew Goodman summarily and without due process of law and for the purpose and with the intent of punishing Andrew Goodman for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Andrew Goodman of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law,

the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

/s/ ROBERT E. HAUBERG,
United States Attorney,
/s/ ROBERT OWEN,
Special Attorney,
Department of Justice.

A True Bill:
/s/ DALLAS H. COWAN,
Foreman of the Grand Jury.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1965

NOS. 59, 60

UNITED STATES OF AMERICA, APPELLANT

v.

CECIL RAY PRICE, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 4–7, 18–25) are not yet reported.

JURISDICTION

The judgments of the district court dismissing one indictment in its entirety as to all appellees (R. 8) and three counts of a second indictment as to fourteen of the appellees (R. 26–28) were entered on March 2, 1965. Notices of appeal to this Court were filed on the same day (R. 9–10, 28–29). On April 26, 1965, the Court entered an order postponing further consideration of the question of jurisdiction and consolidating these appeals (R. 30). The jurisdiction of this Court to review the decision of the district court on direct

appeal is conferred by 18 U.S.C. 3731. *United States* v. *Braverman*, 373 U.S. 405; *United States* v. *Hvass*, 355 U.S. 570.[1]

QUESTIONS PRESENTED

1. Whether the right, secured by the Fourteenth Amendment, not to be deprived of life or liberty without due process of law by persons acting under color of State law is a "right or privilege secured * * * by the Constitution" within the meaning of Section 241 of the Criminal Code.

2. Whether private individuals who act in association with public officials to carry out a scheme to deprive persons of rights protected by the Fourteenth Amendment are within the reach of Section 242 of the Criminal Code.

STATUTES INVOLVED

18 U.S.C. 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise

[1] The jurisdiction of this Court to entertain the direct appeal in No. 60 is not affected by the fact that Counts 2, 3 and 4 were dismissed only as to some of the defendants. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405; *United States* v. *Woodson*, 371 U.S. 12. The objections to jurisdiction interposed in response to the government's jurisdictional statement—all without substance—are discussed in note 4, *infra*, pp. 8–9.

or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. 242 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

On January 15, 1965, the United States grand jury for the Southern District of Mississippi returned two indictments (R. 1–2, 11–16), each charging the same

eighteen persons [2] with offenses against the civil rights of Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, who were killed during the summer of 1964 in the vicinity of Philadelphia, Mississippi. Three of the defendants (Rainey, Price and Willis) were alleged to be State law enforcement officers then "acting by virtue of [their] official positions and under color of the laws of the State of Mississippi". There is no claim that the remaining defendants held public office.

1. The indictment in No. 59 (R. 1–2) involves a single count charging all the defendants with a criminal conspiracy in violation of 18 U.S.C. 241. It alleges that, between stated dates in 1964, the eighteen named persons (R. 2)—

> * * * conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

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[2] James E. Jordan, one of the defendants charged in the two indictments, was not before the district court and is not affected by the rulings below or the present appeals. His case was transferred to the United States District Court for the Middle District of Georgia under Rule 20, F.R. Cr. P.

The indictment further alleges the means by which the defendants planned to achieve the objects of their conspiracy.

The district court dismissed the indictment in its entirety, as to all defendants, on the ground that it did not state an offense against the United States (R. 8). Invoking an alternative ground of the ruling in *Williams* v. *United States*, 179 F. 2d 644 (C.A. 5), affirmed, in part on other grounds, 341 U.S. 70, the court held that Section 241 of the Criminal Code vindicates only "federally created rights", and does not embrace the Fourteenth Amendment right set forth in the indictment (R. 4–7).

2. The indictment in No. 60 (R. 11–16) is in four counts, each of which names all eighteen defendants. Count 1—which was sustained as to all defendants and is not in issue here—charges a violation of 18 U.S.C. 371 by conspiring to commit offenses defined in 18 U.S.C. 242. The present appeal is directed to the partial dismissal of Counts 2, 3 and 4, which charge substantive violations of Section 242.

The three substantive counts are identical, except that each involves a different victim. Thus, Count 2 (R. 13–14) charges that the several defendants—

> * * * while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and

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with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges, and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

The district court granted motions to dismiss Counts 2, 3 and 4 as to all the private defendants (while denying similar motions with respect to the three defendants who are law enforcement officers) (R. 26–28). The court read Section 242 as reaching only the acts of public officers while acting officially. In the court's view, no offense was stated against the private defendants because it was "not charged as an ultimate fact that [any of them] did anything as an official" or that the "individual defendants were officers in fact, or defacto in anything allegedly done by them 'under color of law' " (R. 19–20).

ARGUMENT

INTRODUCTION AND SUMMARY

These cases rest on a charge that the eighteen defendants—three of them State officials acting under color of their offices—jointly conceived and executed a plan against three citizens of the United States and inhabitants of Mississippi, then in State custody, that they be released, intercepted, assaulted and murdered. It is alleged that these acts violated rights guaranteed to the victims by the Due Process Clause of the Fourteenth Amendment and the defendants were accordingly indicted for entering into a conspiracy punishable under Section 241 of the Criminal Code (No. 59), and, in a second indictment (No. 60), for conspiring to violate Section 242 (Count 1) and for committing the substantive crime there defined as to each victim (Counts 2, 3 and 4).

On this appeal, there can be no question that a violation of the Fourteenth Amendment—at least by the three official defendants—has been adequately charged. Nor is it debatable that the Due Process rights described in the indictments have been sufficiently "made definite by decision or other rule of law" to support a criminal prosecution against those charged with "willfully" invading them. See *Screws* v. *United States,* 325 U.S. 91, 103; *Williams* v. *United States,* 341 U.S. 97, 101–102. So much is unchal-

lenged.[3] Indeed, those matters are foreclosed by the decision below sustaining the conspiracy count of the indictment under Section 242 and, with respect to the three State officers, the substantive charges of violating the same statute. Finally, there is no question as to the technical sufficiency of either indictment. The rulings below point out no pleading defect of that kind; they were squarely based on a construction of the statutes involved[4] and, in the circum-

[3] The indictment alleges more than ordinary murder for personal reasons by a group of individuals, some of whom happened to be holding State office. Not only is it alleged that the State law enforcement officers were acting under color of their office (R. 1, 11), but the charge is that they used their official powers to release State prisoners and turn them over to a lynch mob, which one of the officers shielded by his presence, with a view that they be summarily punished without benefit of trial (see R. 2, 12, 14, 14–15, 15–16). Thus, the case is plainly within the rule announced in *Screws* and the third *Williams* decision. That the death of the victims was the ultimate consummation of the conspiracy does not put in doubt the applicability of Section 242 is settled by *Screws*. The same question with respect to Section 241 (assuming it protects Fourteenth Amendment rights) is settled by *Logan* v. *United States*, 144 U.S. 263.

[4] There is accordingly no doubt about the jurisdiction of this Court to entertain the government's appeal. To be sure, the court below noted that the indictment in No. 59 alleged that the three State officers charged were "each acting at all times under 'color of laws'", whereas "[t]he statute mentions nothing about 'color of law' in the description of the crime embraced" (R. 4). But the suggestion that the court was pointing to a pleading defect and dismissed the indictment partly on that ground is frivolous. At worst, the allegation is surplusage which would support a motion to strike. F.R. Cr. P., Rule 7(d). In any event, it is plain the court was quarreling, not with

stances, no other issue is open on this direct appeal. See *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *Hvass*, 355 U.S. 570, 574. Only two questions remain:

1. The first is whether Section 241 reaches the invasion of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. If so, dismissal of the indictment in No. 59 must be reversed. No interpretation of the Constitution is required to sustain that charge. Three of the accused are State officials, alleged to have acted under color of their offices. They, of course, have the capacity directly to violate the Fourteenth Amendment. The others

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the wording of the indictment, but its theory—that Section 241 reaches Fourteenth Amendment rights.

Nor does the trial court's comment that the substantive counts of the indictment in No. 60 do not charge that the private defendants were "officers in fact, or de facto in anything allegedly done by them 'under color of law'" (R. 20) amount to a holding that the indictment was technically deficient in this respect. We are not questioning the court's reading of the indictment; our appeal is from the ruling that persons without official status are never amenable to Section 242, no matter how involved they may be in the crime of State officers. The answer to that question depends upon a construction of the substantive statute (read in the light of the Fourteenth Amendment) or of the aider or abettor statute (18 U.S.C. 2).

Finally, there is no merit to the suggestion that the direct appeal in No. 60 is defeated by the failure to plead the "aider and abettor" statute, 18 U.S.C. 2, which is now relied upon to sustain the substantive charges against the private defendants. It is well settled that an aider and abettor, made a principal by 18 U.S.C. 2, may be indicted as a principal. *Jin Fuey Moy* v. *United States*, 254 U.S. 189; *Nye & Nissen* v. *United States*, 168 F. 2d 846 (C.A. 9), affirmed, 336 U.S. 613.

are charged as co-conspirators who joined in a scheme to deprive the victims of their right "not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi" (R. 12). In No. 59, it does not matter whether or not they are themselves viewed as having acted "under color of law," for the only charge here is one of conspiracy and it is settled that a "person may be guilty of conspiring although incapable of committing the objective offense." *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Gebardi* v. *United States*, 287 U.S. 112, 121; *United States* v. *Holte*, 236 U.S. 140, 145. See, also, *United States* v. *Trierweiler*, 52 F. Supp. 4 (E.D. Ill.). Indeed, the court below so ruled with respect to the conspiracy count under Section 242 in No. 60, and the same principle obviously applies to Section 241 if it also reaches invasion of Fourteenth Amendment rights.

To repeat, the only question in No. 59 is one of statutory construction: Whether rights guaranteed by the Due Process Clause of the Fourteenth Amendment (and made specific by decisions of this Court) are "right[s] or privilege[s] secured * * * by the Constitution" within the meaning of Section 241. We answer that question in the affirmative on the basis of the language of the statute, its context, and its legislative history. Because the text itself, in its historical setting, so naturally lends itself to that reading, the principal burden of our argument on this point is a rebuttal of the several considerations recently summoned against such a construction.

2. The other issue arises only in No. 60—with respect to the dismissal of the substantive charges laid under Section 242 against the defendants without official status. Counts 2, 3 and 4 of the indictment allege that fifteen private persons, together with three State officials, committed the offense defined in Section 242. Although they were all formally described as "acting under color of the laws of the State of Mississippi" (R. 13–14, 14, 15), the court below correctly noted that "[t]he indictment states that three of the defendants were acting as officers in all that they did, but then does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'" (R. 20). The question is whether such private persons can be prosecuted under Section 242 when they act in association with State officials.

We present two answers to the ruling. First, we argue that the close association alleged between the private defendants and the State officials charged with them makes all of them amenable to the statute as persons acting "under color of law," albeit those without official status do not become de facto officers. Alternatively, we urge that the private defendants, even if incapable of violating the statute on their own in the circumstances of this case, are properly indicted as aiders and abettors of persons with capacity to commit the offense.

I

SECTION 241 OF THE CRIMINAL CODE PROTECTS RIGHTS SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The question whether Section 241 punishes conspiracies directed against Fourteenth Amendment rights was fully canvassed in this Court less than fifteen years ago in *United States* v. *Williams,* 341 U.S. 70, and the two major opinions in that case fully explored the arguments on each side of the issue. Against that background one hesitates to rehearse the considerations involved once again. If we do so briefly it is only because, on that occasion, the Court divided evenly and did not resolve the question—four Justices, in an opinion by Mr. Justice Frankfurter, expressing their view that Fourteenth Amendment rights were not within the scope of Section 241 (341 U.S. at 71–82), four other Justices, in an opinion by Mr. Justice Douglas, reaching the opposite conclusion (*id.* at 87–96), and Mr. Justice Black voting to affirm dismissal of the charge on independent grounds (*id.* at 85–86). Inevitably, our discussion will track much of the opinion of Mr. Justice Douglas in that case and will attempt to answer the objections raised by the opinion of Mr. Justice Frankfurter.

Section 241, among other things, punishes "persons" who conspire to interfere with the exercise or enjoyment by a "citizen" of "any right or privilege secured to him by the Constitution or laws of the United States." On its face, the provision is certainly broad enough to reach conspiracies directed against

Fourteenth Amendment rights, and its enactment less than two years after the ratification of that Amendment—as Section 6 of the Enforcement Act of 1870 (16 Stat. 140, 141)—would naturally support that inference. There is a heavy burden, it seems to us, on those who would encumber the straightforward text with a restrictive gloss to the effect that Section 241 does not protect all federal constitutional rights, including he rights then recently declared by the post-War Amendments.

The situation might be different if the narrow reading given Section 241 by the court below derived from a venerable tradition initiated by judges who were immediately familiar with the enactment of the provision. But that is not the case. Indeed, until *Williams,* there seems to have been no doubt expressed on the point. As Mr. Justice Douglas there noted (341 U.S. at 92–93), the early lower federal courts had taken it for granted that Section 241 covered Fourteenth Amendment rights. See *United States* v. *Hall,* 26 Fed. Cas. 79 (S.D. Ala); *United States* v. *Mall,* 26 Fed. Cas. 1147 (S.D. Ala.); *Ex parte Riggins,* 134 Fed. 404 (N.D. Ala.). And this Court had implied as much. There were first a series of cases involving prosecutions of private individuals under Section 241 for alleged violations of Fourteenth Amendment rights which were decided on constitutional grounds—presumably on the premise that the statute reached violations of the Amendment and that it was necessary to determine the scope of the constitutional provision.

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See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542; *Hodges* v. *United States*, 203 U.S. 1; *United States* v. *Wheeler*, 254 U.S. 281. Then came the decision in *Guinn* v. *United States*, 238 U.S. 347, where, in a case involving a congressional election, the Court upheld a prosecution under Section 241 which seems to have rested wholly on an alleged violation of the Fifteenth Amendment—which is no more within the scope of the statute than the Fourteenth Amendment if the restrictive view espoused in *William* is correct. On the same day, in *United States* v. *Mosley*, 238 U.S. 383, 387–388, the Court, speaking through Mr. Justice Holmes, characterized the "sweeping general words" of Section 241 as dealing "with Federal rights and with all Federal rights," "in the lump." The "broad language of the statute" was again noticed in *United States* v. *Classic*, 313 U.S. 299, and (albeit no Fourteenth Amendment rights were involved), the Court seems to have assumed that Section 241 (then § 19), like Section 242 (then § 20), protects all constitutional rights. And, as late as *Screws* v. *United States*, 325 U.S. 91— where the Court explicitly ruled that Section 242 protects rights guaranteed by the Due Process Clause of the Fourteenth Amendment—no one took issue with Mr. Justice Rutledge's statement that there are "no differences in the basic rights guarded" by Sections 241 and 242. *Id.* at 119. As Mr. Justice Douglas has fully shown (341 U.S. at 93–94), that decision also set at rest the objection that Section 241 must necessarily fail as unduly vague if construed to encompass Fourteenth Amendment rights.

Obviously the suggested limited scope of Section 241 does not appear on the surface—else three generations of judges would not have overlooked it until 1950. Accordingly, we must look on the words more critically and carefully assess them in their context. And, lest the true meaning lie buried still deeper, we must attempt to elucidate the sparse legislative history of the provision.

A. THE TEXT AND CONTEXT OF SECTION 241

The most convenient method for the initial inquiry is to parse Section 241, phrase by phrase, focusing on the restrictive implications attributed to each (by four of the Justices) in *Williams*.

1. "*Persons.*" It has been suggested that characterization of the offenders under Section 241 as mere "persons" implies private individuals, acting on their own, rather than State officials or persons acting "under color of law," and that the provision therefore does not encompass Fourteenth Amendment rights which only those wielding State power can invade. See 341 U.S. at 76–78. The term "persons" was designedly used, it is said, to reach the members of the Ku Klux Klan, the acknowledged object of Senator Pool who wrote the provision in question. See *United States* v. *Mosley*, 238 U.S. 383, 387. The significance of that usage is further illumined—so goes the argument—when one notices that other provisions of the 1870 Act (where our provision originated as Section 6) carefully delineated the scope of coverage. Thus, Sections 2 and 3 of that Act were directed to "persons or officers" (16 Stat. 140) and

Section 17, now 18 U.S.C. 242, reached only "person[s] [acting] under color of * * * law" (16 Stat. 144).[5] The suggestion apparently is that there is a purposeful symmetry, dividing the measure into three neat categories of provisions—those which cover only governmental action, those which reach only private acts, and, finally, those which encompass both—and that all of this is confused, with resulting overlapping, if the modern Section 241 is not confined to rights which are secured by the federal Constitution or laws against private invasion.

Perhaps the short answer is that the entire argument is constructed upon the false premise that Congress can never reach invasion of Fourteenth Amendment rights by private persons. As we elaborate in *United States* v. *Guest,* No. 65, this Term, this was certainly not the assumption of those who wrote Section 241, nor do we think it a correct statement of constitutional law. But we do not rest there. Even accepting the proposition that all legislation under the Fourteenth Amendment must speak directly to the State or those acting under its authority, the argument derived from the use of the unqualified word "persons" in Section 241 does not hold up.

First, it is well settled that Section 241 reaches both private and public action—offenses of mere individuals acting on their own (*e.g., Ex parte Yarbrough,* 110 U.S. 651; *United States* v. *Waddell,* 112 U.S. 76; *Logan* v. *United States,* 144 U.S. 263; *In re Quarles,*

[5] In the codification of Section 17 as Section 20 of the Criminal Code of 1909 (35 Stat. 1092), "person" became "whoever" and that change has been retained.

158 U.S. 532; *Motes* v. *United States*, 178 U.S. 458), and acts of State officials acting "under color of law." *E.g., Guinn* v. *United States*, 238 U.S. 347; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *United States* v. *Saylor*, 322 U.S. 385. That is an end of the distinction between the provisions of the 1870 Act which are directed solely against non-governmental action and those which encompass both officials and other wrongdoers. Section 241 has precisely the same scope as if it were explicitly addressed to "persons or officers."

Once that flaw is uncovered, the whole complicated edifice built upon the choice of the word "persons" falls of its own weight. If State officials are within the statutory coverage, we can no longer rely on Senator Pool's preoccupation with the Klan as implying an intention to restrict the provision to private conspiracies. Nor does fear of overlapping among the several provisions of the Enforcement Act of 1870 deter us, for, whether or not § 241 protects Fourteenth Amendment rights, overlapping is now inevitable with respect to the invasion of civil rights by State officials. See, *e.g., United States* v. *Classic, supra.* We need merely answer with Mr. Justice Holmes, speaking for the Court in *United States* v. *Mosley, supra*, 238 U.S. at 387: "Any overlapping that there may have been might well have escaped attention, or if noticed have been approved."

To be sure, there subsists a difference between the coverage of Section 241, which encompasses both private and official offenders, and Section 242, which reaches only persons acting "under color of any law,

statute, ordinance, regulation, or custom." These opening words of Section 242 were deemed appropriate (or necessary) when the provision (originally Section 17 of the Enforcement Act of 1870) protected only a limited category of Fourteenth Amendment equal protection rights.[6] But, of course, it does not

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[6] As already noted, Section 242 derives from Section 17 of the Enforcement Act of 1870 (16 Stat. 144). In relevant part, that provision punished deprivations of "any right secured or protected" by Section 16 of the Act, which, in turn (tracking the language of the Civil Rights Act of 1866), guaranteed "all persons within the jurisdiction of the United States * * * the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."

The subsequent history of the provision is traced by Mr. Justice Rutledge in his concurring opinion in *Screws* v. *United States*, 325 U.S. 91, 120:

"At first §20 [now §242] secured only rights enumerated in the Civil Rights Act. The first ten years brought it, through broadening changes, to substantially its present form. Only the word 'willfully' has been added since then, a change of no materiality, for the statute implied it beforehand. 35 Stat. 1092. The most important change of the first decade replaced the specific enumeration of the Civil Rights Act with the present broad language covering 'the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States.' R.S. 5510. This inclusive designation brought §20 into conformity with §19's [now §241] original coverage of 'any right or privilege secured to him by the Constitution or laws of the United States.' Since then, under these generic designations, the two have been literally identical in the scope of the rights they secure. The slight difference in wording cannot be one of substance."

For the full text of each of the successive versions of Section 242—as well as Section 241—see the table appended to the opinion of Mr. Justice Frankfurter in *United States* v. *Williams*, 341 U.S. at 83.

follow that the absence of a similar restriction in a provision that protects rights secured against all categories of offenders forecloses protection of Fourteenth Amendment rights. The statute need not enumerate those with capacity to violate the Amendment: the Constitution itself does that. Indeed, since the substantive coverage of Section 242 was broadened to include all federal constitutional and statutory rights (see *Screws* v. *United States,* 325 U.S. 91, 120 (concurring opinion of Mr. Justice Rutledge)), the restriction of the provision to offenders wielding State power has become somewhat anomalous. Insofar as Section 242 now punishes invasion of rights also secured against private action (see *United States* v. *Classic,* 313 U.S. 299), there is plainly no constitutional necessity for the restriction and the consequence is that individual offenses against such rights are not federal crimes if no part of a conspiracy. There is certainly no warrant for imputing to the drafters of Section 241 the forced dilemma of covering Fourteenth Amendment rights, if at all, only by restricting their entire provision to State officers.

The upshot is that there is a certain overlapping between the predecessor of Section 241 and the other provisions of the Enforcement Act of 1870—the area of overlapping having increased since the expansion of Section 242. But, as already noted, that is not a sound argument against our reading of Section 241. The fact is that the Act of 1870 is not a symmetrical construction. It is a composite, hastily welded out of disparate pieces, attributable to a variety of spon-

sors, each with his particular concern.[7] As we shall see, Senator Pool, the author of our provision, had perhaps the broadest view and meant to cover all rights against all interference, including those rights recently declared by the Fourteenth Amendment, which he thought Congress might safeguard against both official and unofficial invasion.

2. *"Citizen."* Section 241 punishes only offenses against citizens of the United States. See *Baldwin* v. *Franks,* 120 U.S. 678. Hence, it is argued that the provision is concerned alone with rights appertaining to national citizenship, not including the Fourteenth Amendment rights to due process and equal protec-

[7] Thus, Sections 1–4 of the Act—which are concerned solely with the right to vote—derive from the parent bill reported by the Senate Judiciary Committee as a substitute for other voting measures before the Senate. Cong. Globe, 41st Cong., 2d Sess., pp. 2942, 3479–3480. Sections 16 and 17—which reenacted provisions of the Civil Rights Act of 1866 and ultimately became Section 242 of the Criminal Code—are traceable to an amendment submitted by Senator Stewart of Nevada. *Id.*, p. 3480. And Section 6—now our Section 241—, together with Section 7, was proposed by Senator Pool. *Id.*, pp. 3612, 3679. There were many other amendments, besides. See *id.*, p. 3688 (comment of Senator Trumbull). Just before the bill was finally passed (*id.*, p. 3688), one Senator characterized it as "a conglomeration of incongruities and contradictions" and claimed no one knew its true content in light of the number of amendments hastily adopted (*ibid.*, Senator Thurman). Another member accurately stated: "The bill as it now stands is the child of many fathers. It is a piece of patchwork throughout." *Ibid.* (Senator Casserly). See, also, the opinion of Mr. Justice Frankfurter in *United States* v. *Williams, supra,* at pp. 74–75, and n. 2.

tion which are not derived from citizenship or restricted to citizens. And, again, a contrast is made with Section 242 which, like the Fourteenth Amendment itself, expressly protects every "inhabitant" of the land, citizen or not.

Significantly, this argument has never gained a foothold in this Court. Although the court of appeals, in *Williams,* had stressed the fact that Section 241 protects only the rights of citizens (see 179 F. 2d at 647), nothing was made of the point by Mr. Justice Frankfurter when the case came here. That is doubtless because the argument immediately runs into an insuperable barrier when we notice that, of all the rights held to be protected by Section 241, none is peculiar to citizens. It is so with respect to the right to vote in congressional elections (*Ex parte Yarbrough, supra; Guinn* v. *United States, supra; United States* v. *Mosley, supra; United States* v. *Classic, supra; United States* v. *Saylor, supra*), which is not derived from citizenship or necessarily restricted to citizens. *Minor* v. *Happersett,* 21 Wall. 162; *Pope* v. *Williams,* 193 U.S. 621, 632–633. And the same is true of the right to peaceful enjoyment of federal homesteads (*United States* v. *Waddell, supra*) which were open to aliens who had merely declared their intention to become citizens (Rev. Stat. 2289), of the right to be secure against unauthorized violence when in federal custody (*Logan* v. *United States, supra*), and of the right to inform on violations of the Federal tax

laws (*In re Quarles, supra; Motes* v. *United States, supra*).*

We can speculate why Section 241 was written to protect citizens alone. Perhaps there was a conscious purpose to avoid encompassing Indians who were not generally viewed as naturalized by the Fourteenth Amendment. See *Elk* v. *Wilkins,* 112 U.S. 94; James, *The Framing of the Fourteenth Amendment* (1956), p. 143. But, without doubt, the primary focus was on the Negro in the reconstructed States, recently emancipated and now granted citizenship; for that purpose, it was enough to protect all citizens. Section 242, on the other hand, was explicitly written to protect aliens as well as Negro citizens, as the text makes clear. Moreover, in using the word "inhabitant" it was merely tracking the language of the Civil Rights Act of 1866 (14 Stat. 27) which assured the recently emancipated slaves, not yet citizens, some of the same

* Mr. Justice Frankfurter's opinion for four members of the Court in *Williams* can be read as characterizing the right to vote in federal elections and the rights vindicated in *Logan*, *Quarles* and *Motes* as rights of national citizenship (see 341 U.S. at 77, 79–80). While that description would not be wholly accurate, the point is not important in light of the explicit recognition that the right involved in *United States* v. *Waddell*, *supra*, "did not pertain to United States citizenship" (*id.* at 80), and the conclusion of the opinion that the category of rights protected by Section 241 are those "arising from the substantive powers of the Federal Government" (*id.* at 73, 77, 78, 79, 82)—rather than only those appertaining to national citizenship. In *United States* v. *Guest*, No. 65, this Term, we note our difficulty with the proposition that the Fourteenth Amendment (and presumably also the Fifteenth) did not—by its Fifth Section—enlarge the "substantive powers" of the national government. See Brief for the United States, pp. 18–46.

rights as were "enjoyed by white citizens". See note 6, *supra*, p. 18. In sum, the substantive coverage of these provisions does not depend on the class of persons protected: just as Section 242 originally secured a narrow group of rights for everyone, Section 241 protects only a limited class (citizens) but with respect to all federal rights.

3. "*[R]ight or privilege [granted or] secured * * * by the Constitution or laws of the United States.*" As originally enacted (as Section 6 of the Act of 1870), Section 241 was directed at the invasion of "any right or privilege granted or secured" to citizens by the federal Constitution or statutes. The word "granted" was dropped four years later when the federal statutes were revised. See Rev. Stat. § 5508. Presumably, this was done on the ground that the word "granted"—at best a mere alternative descriptive separated by a disjunctive—was surplusage, for the "revision" of 1874 was not meant to alter substance. See 14 Stat. 74; 16 Stat. 96. Nevertheless, apparently focusing on that word, and contrasting the present language of Section 242 ("rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"), it has been argued that the "narrow phase" of Section 241 does not cover Fourteenth Amendment rights. See 341 U.S. at 78.

The proposition is difficult to grasp. Insofar as any contrast between the language of Section 241 and Section 242 is appropriate, the argument seems reversed. Indeed, if one or the other of the two provisions must be restricted to rights of national citizenship, an echo of the "privileges or immunities"

clause of the Fourteenth Amendment is more obvious in Section 242 ("rights, privileges, or immunities") than in Section 241 ("right or privilege"). And the absence of the word "granted" in Section 242 and its presence in the predecessor of Section 241 suggests, if anything, that the former provision deals only with pre-existing rights inherent in national citizenship, not conferred by the Fourteenth Amendment, but merely re-affirmed by it and guaranteed (somewhat redundantly) against contrary State laws, whereas the latter section (§ 241) protects the new constitutional rights declared for the first time by the Due Process and Equal Protection Clauses of the Amendment.

But the comparison, in any event, is wholly misleading, for the two texts put in opposition are not of the same date. The phrase "secured or protected" in Section 242 is directly derived from the Civil Rights Act of 1866 (see note 6, *supra*, p. 18) written some years before Section 241. That the rights involved are not described as "granted" may well be due to the fact that there, as well as in the 1870 text, the direct reference was to a previous section of the same statute—not the Constitution—which was viewed as merely implementing rights already conferred by the Thirteenth or Fourteenth Amendment. The rest of the quoted language of Section 242 was substituted in 1874 for a longer and very different phrase of apparently narrower content in the original provision of 1870. See note 6, *supra*, p. 18. And at the same time that new text came into the law the word "granted" was deleted from Section 241.

Plainly nothing can be learned by now comparing the language of two provisions which have wholly different verbal histories.

Comparisons aside, there is nothing in the characterization of the rights protected by Section 241 which excludes the rights to due process and equal protection conferred by the Fourteenth Amendment. To be sure, the Due Process and Equal Protection Clauses did not grant absolute rights, good against the world: the Amendment only deals with the relationship between the inhabitant and the State. But even if they run only against the State, these are nevertheless properly termed "rights," "granted," or at least "secured" by the Constitution. As this Court said in the *Civil Rights Cases,* 109 U.S. 1, 11, "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment." See, also, *Strauder* v. *West Virginia,* 100 U.S. 303, 307–308; *Ex parte Virginia,* 100 U.S. 339, 345. That this was the usage of the time is illustrated by Section 17 of the 1870 Act (the predecessor of § 242) which referred to the equal protection guarantees enumerated in the previous section as "right[s] secured or protected" by that provision. Note 6, *supra,* p. 18.

B. THE LEGISLATIVE HISTORY OF SECTION 241

We have seen that the most painstaking analysis of the text of Section 241, viewed alone and in the context of the statute where it originated, merely confirms what the language, on its face, indicates: that the provision broadly punishes conspiracies interfering with all federal rights, including those declared by the Fourteenth Amendment. It only re-

mains to notice that the immediate legislative history of Section 241 fully supports that conclusion.

We begin with the seemingly decisive fact that Senator Pool, introducing Section 241 in its original form, explicitly referred to "rights which are conferred upon the citizen by the fourteenth amendment" as among those covered by his provision. Cong. Globe, 41st Cong., 2d Sess. 3611; *id.*, at 3613 (App., *infra*, pp. 43, 48).[9] There is no explaining away that statement. In context, it is clear that the sponsor of the provision had in mind the rights conferred by the Due Process and Equal Protection Clauses and not, as has been suggested (341 U.S. at 76–77, n. 4), the pre-existing rights of national citizenship available for the first time to those whom the Amendment made citizens and now expressly guaranteed against State invasion by the new Privileges and Immunities Clause. The indications are numerous.

First, Senator Pool expressly invoked the language of the due process and equal protection guarantees of the Amendment. He showed his particular concern with the Equal Protection Clause by stressing the use of the word "deny" in that provision "in contradistinction" to the mere prohibition against a State "making or enforcing laws" abridging the privileges and immunities of national citizenship in the first clause—arguing that here the State's obligation was affirmative and that, in the event of default, con-

[9] We have reproduced as an appendix (*infra*, pp. 37–50) the whole of Senator Pool's speech introducing the amendment which became Section 6 of the Enforcement Act of 1870, and, ultimately, Section 241 of the Criminal Code. It is the only pertinent text of legislative history.

gressional power was therefore greater. *Id.*, at 3611 (App., *infra*, pp. 40–41). In light of later decisions, beginning with the *Slaughter-House Cases*, 16 Wall. 36, the Senator was of course correct in neglecting the rights "conferred" by the Privileges and Immunities Clause: whatever they are, they pre-existed the Fourteenth Amendment and could be secured against State invasion without benefit of the new Amendment.

Again, in the same passage, Senator Pool makes repeated reference to the Civil Rights Act of 1866 and indicates that those rights, among others, are those which his measure will protect. *Ibid.* As we know, those are basically equal protection rights, now vindicated (along with rights derived from the Due Process Clause of the Fourteenth Amendment and others) by Section 242.

Finally, the sponsor's purpose to protect the right secured by the Fifteenth Amendment against the action of hostile conspiracies is unmistakable. *Ibid.* (App., *infra*, pp. 40–43). Yet, that right is no more a right "appertaining to national citizenship" or one derived "from the substantive powers of the federal government" than are those secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Having strayed so far from the narrow category of rights it is said he was concerned with, it seems highly unlikely that the sponsor should have stopped short of including all Fourteenth Amendment rights—which he mentions in one breath with the right secured by the Fifteenth Amendment. *Id.*, at 3611, 3613 (App., *infra*, pp. 40, 43, 48).

To be sure, Senator Pool believed the rights protected by his bill could be secured against private in-

terference as well as State denial. *Id.* at 3611–3613 (App., *infra,* pp. 38–49). But that does not tend to indicate that he meant to exclude rights derived from those constitutional provisions which are explicitly directed to States alone. As we have noted, he meant to cover the right guaranteed by the Fifteenth Amendment which presents the identical problem. See *James* v. *Bowman,* 190 U.S. 127. Plainly, he thought that Congress might legislate to protect Fourteenth and Fifteenth Amendment rights against the action of private conspiracies whenever the State had failed ot effectively secure those rights. We advance a like contention in *United States* v. *Guest,* No. 65, this Term. Whether he was right or wrong, however, does not matter here. The provision enacted is carefully limited to "rights secured by the Constitution"; its scope is measured by the constitutional provision involved. As Mr. Justice Holmes noted in *United States* v. *Mosley, supra,* 238 U.S. at 387, here "Congress put forth all its powers"; it meant to afford all possible protection but it was careful not to overstep the constitutional line, wherever it might later be drawn.

II

SECTION 242 OF THE CRIMINAL CODE REACHES PRIVATE INDIVIDUALS WHO ACT IN ASSOCIATION WITH STATE OFFICERS TO CARRY OUT A SCHEME TO INVADE RIGHTS SECURED BY THE PROVISION.

As we have already noted, the two indictments before the Court clearly charge violations of specific rights guaranteed by the Fourteenth Amendment. It is settled that such conduct "under color of law," if

done willfully as here alleged, contravenes Section 242 of the Criminal Code. *Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United States,* 341 U.S. 97. Accordingly, the court below sustained the indictment in No. 60 with respect to the defendants who hold State office and were alleged to be acting officially (albeit illegally). But—while upholding as to all the charge of conspiring to violate Section 242—the court dismissed the substantive charges against the private defendants on the ground that they lacked capacity to commit the offense defined by Section 242. We think the ruling erroneous, first, because, in the circumstances alleged, the private defendants, although not State officials, were acting "under color of law" within the meaning of the statute; and, second, because, regardless of their capacity to themselves commit the offense, they are amenable to Section 242 as aiders and abettors of the State officials charged.

A. The trial judge correctly observed that the indictment in No. 60 does not claim that fourteen of the defendants were public officials of the State of Mississippi, de jure or de facto. On the other hand, the substantive counts (R. 13–16) explicitly charge that each of the defendants, including those who held no official position, were "acting under color of the laws of the State of Mississippi," and the indictment, as a whole, alleges that all of them were joint conspirators, the private defendants acting in close association with those who were law enforcement officers, one of whom was present at all times and presumably lent the protective umbrella of his office to all that

was done. Thus, it is apparent that the court below held that private persons are never amenable to the sanctions of Section 242, no matter what the circumstances. Otherwise, the allegation of action "under color of law", in the language of the statute, should have required upholding the charge. In effect, the ruling is that none but State officers can act "under color of law" within the meaning of Section 242. The proposition, we submit, is untenable.

Certainly, nothing in the nature of the rights protected by Section 242 requires confining its reach to State officers in all circumstances. Indeed, it has long been settled that the conduct of private persons may be subject to the prohibitions of the Fourteenth Amendment if the State, through its officers, "has so far insinuated itself into a position of interdependence * * * that it must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. There are many variations, *E.g., Pennsylvania* v. *Board of Trusts,* 353 U.S. 230; *Peterson* v. *City of Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Griffin* v. *Maryland,* 378 U.S. 130; *Robinson* v. *Florida,* 378 U.S. 153. But the basic situation is always the same: a private activity falls within the scope of the Fourteenth Amendment because—albeit without assuming full official status or altogether losing its private character—it becomes involved in a "joint venture" of sorts with the State. That is our case.

If the scope of action "under color of law" is coextensive with "State action" under the Fourteenth

Amendment—as is usually tacitly assumed [10]—the decisions just cited end the question. But there are, in any event, like rulings construing the phrase "under color of law" in 18 U.S.C. 242 or its civil counterpart, 42 U.S.C. 1983—where it has the same meaning. *Monroe* v. *Pape,* 365 U.S. 167, 185. Thus, in *Baldwin* v. *Morgan,* 251 F. 2d 780, 788 (C.A. 5), the court rejected a claim that private persons were not acting "under color of any law" in these words:

> State action is indeed required under the Fourteenth Amendment and 42 U.S.C.A. § 1983. But those who directly assist the admitted state agency in carrying out the unlawful action become a part of and subject to the sanction of Section 1983. * * *

See, also, *Smith* v. *Holiday Inns of America,* 336 F. 2d 630 (C.A. 6); *Hampton* v. *City of Jacksonville,* 304 F. 2d 320 (C.A. 5); *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4); *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

[10] Thus, most of the modern cases construing the Fourteenth Amendment were filed under 28 U.S.C. 1343(3) which gives the district courts jurisdiction of civil cases to redress deprivation of constitutional rights "under color of any State law, statute, ordinance, regulation, custom or usage," and the injunction was sought and granted under 42 U.S.C. 1983 which provides for equitable relief from a deprivation of constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." See, *e.g.*, *Turner* v. *City of Memphis,* 369 U.S. 350, 351; *McNeese* v. *Board of Education,* 373 U.S. 668, 671; *Reynolds* v. *Sims,* 377 U.S. 533, 537. The assumption apparently indulged is that whatever violates the Amendment necessarily was done "under color of law."

Closest in point, perhaps, is *United States* v. *Lynch*, 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5), certiorari denied, 342 U.S. 831, a case strikingly similar to ours. There, it was charged that a sheriff and his deputy arrested several persons and "turn[ed] them over to a hooded group in disguise to be beaten." On these facts the court held:

> While it is true that one must be acting under color of state law in order to violate Section 242, and that ordinarily a private citizen would not act under color of law, it is also true that the presence of state officers and their active participation with other defendants who were not officers would furnish the "color of law" required as to all the defendants. [94 F. Supp. at 1014.][11]

We conclude, as in *Lynch*, that when the private members of the mob knowingly linked hands with the officers to carry out a common plan to deprive Schwerner, Goodman and Chaney of their constitutional rights they lost their claim to be treated as mere private citizens. Having united with State officials and invoked the protective umbrella of their presence, the private defendants were acting "under color of law" and became amenable to the sanctions of Section 242.

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[11] See, also, *Downie* v. *Powers*, 193 F. 2d 760 (C.A. 10), where the court held that "* * * a wilful or purposeful failure of the Chief of Police or other City officials to preserve order, keep the peace, and to make the Jehovah's Witnesses secure in their right to peaceably assemble, would undoubtedly constitute acquiescence in, and give color of law to, the actions of the mob." 193 F. 2d at 764. And see *Williams* v. *United States*, 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97.

B. In addition, the substantive charges against the private defendants should have been sustained on the ground that they may have been aiders and abettors of the State officers jointly indicted. While that relationship is suggested by the language of indictment, it is true that the private defendants are formally charged as principals, as themselves acting "under color of the laws of the State of Mississippi." But, as already noted (note 4, *supra*, p. 9), indictment as a principal is no bar to conviction as an aider or abettor (which, in turn, permits punishment as a principal).[12]

The governing principle that one without capacity to commit an offense may nevertheless be convicted if he aided and abetted its commission is well settled. The rule is embodied in 18 U.S.C. 2(a) which provides that "[w]hoever * * * aids, abets, counsels, commands, induces, or procures [the] commission [of an offense against the United States] is punishable as a principal." Whatever doubt there may have been that persons lacking capacity to commit the substantive offense were covered was removed in 1951 when the

[12] See, in addition to the authorities cited at note 4, *supra*, p. 9, *United States* v. *Russo*, 284 F. 2d 539 (C.A. 2); *Swanne Soon Young Pang* v. *United States*, 209 F. 2d 245 (C.A. 9); *United States* v. *Knickerbocker Fur Coat Co.*, 66 F. 2d 388 (C.A. 2); *Melling* v. *United States*, 25 F. 2d 92 (C.A. 7); *DiPreta* v. *United States*, 270 Fed. 73 (C.A. 2); *Vane* v. *United States*, 254 Fed. 32 (C.A. 9); *United States* v. *Snyder*, 14 Fed. 554 (D. Minn.); *United States* v. *Palermo*, 172 F. Supp. 183 (E.D. N.Y.); *United States* v. *J. R. Watkins Co.*, 127 F. Supp. 97 (D. Minn.); *United States* v. *Selph*, 82 F. Supp. 56 (S.D. Cal.); *United States* v. *Decker*, 51 F. Supp. 20 (D. Md.).

aider and abettor statute was amended to read as it does now. The report accompanying that legislation (S. Rep. No. 1020, 82d Cong., 1st Sess., p. 7) explicitly states:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. * * *

The judicial decisions are in accord. See *Wilson* v. *United States,* 230 F. 2d 521, (C.A. 4); *Koehler* v. *United States,* 189 F. 2d 711, (C.A. 5); *May* v. *United States,* 175 F. 2d 994 (C.A. D.C.); *Haggerty* v. *United States,* 5 F. 2d 224 (C.A. 7); *Barron* v. *United States,* 5 F. 2d 799, (C.A. 1); *United States* v. *Snyder,* 14 Fed. 554 (D. Minn.); *United States* v. *Melekh,* 193 F. Supp. 586, (N.D. Ill.); *United States* v. *Bayer,* 4 Dill. 407, 24 Fed. Cas. 1046 (D. Minn.). The *Wilson* and *Snyder* cases make it clear that the rule applies when the aider and abettor is incapable of committing the offense because he is not acting "officially" or does not hold the described public office. Thus, in *Wilson,* the statute (now 18 U.S.C. 201) reached only the solicitation or acceptance of bribes by a government officer acting in his "official capacity" and the court sustained the conviction of one who claimed not to be so acting on the alternative ground that he was, in any event, punishable as an aider or abettor. And in *Snyder,* a co-defendant who was not himself a postmaster but had aided and abetted the postmaster was held accountable under a statute that punished "[a]ny post-

master who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation."

The same rule applies with respect to Section 242. Thus, in *Koehler* v. *United States, supra,* a State officer and one Ackermann, who was a private individual,[13] were jointly indicted for violating Section 242 and the court sustained Ackermann's conviction for having "aided, abetted and counseled Koehler in the commission of this offense", finding that the "evidence conclusively reveals that Ackermann and Koehler were acting in concert in perpetrating the offense" and that Ackermann was "assisting" Koehler. 189 F. 2d at 712–714. Likewise, in *United States* v. *Lynch,* 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5), certiorari denied, 342 U.S. 831, some of the defendants were police officials and others were private citizens. In answer to the private defendants' argument that they could not violate Section 242 "because it related only to deprivations by a state," the district court ruled (94 F. Supp. at 1013):

> True, Section 242 was enacted pursuant to the Fourteenth Amendment and relates to deprivations by states (acting through state officials) and not to acts of private individuals. It does

[13] Although the *Koehler* opinion itself does not explicitly state that Ackermann was a private person, a subsequent opinion of the same court describes the *Koehler* case as one "in which a private citizen assisted a constable in a brutal assault and unlawful imprisonment * * *" *Baldwin* v. *Morgan,* 251 F. 2d 780, 789 (C.A. 5). Thus the court below was in error when, in referring to the *Koehler* case, it stated that "Ackermann was not a mere private citizen * * *" (R. 21).

not follow, however, that private individuals cannot be guilty as principals if they aid and abet state officers in such violations. Section 2, Title 18, United States Code Annotated.

CONCLUSION

For the foregoing reasons, the judgments of the district court dismissing the indictment in No. 59 in its entirety and parts of three counts of the indictment in No. 60 should be reversed and the causes remanded for trial.

Respectfully submitted.

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SEPTEMBER 1965.

APPENDIX

Remarks of Senator Pool of North Carolina on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611–3613).

Mr. POOL. Mr. President, the question involved in the proposition now before the Senate is one in which my section of the Union is particularly interested; although since the ratification of the fifteenth amendment, which we are now about to enforce by appropriate legislation, other sections of the country have become more or less interested in the same question. It is entering upon a new phase of reconstruction; that is, to enforce by appropriate legislation those great principles upon which the reconstruction policy of Congress was based.

I said upon a former occasion on this floor that the reconstruction policy of Congress had been progressive, and that it was necessary that it should be progressive still. The mere act of establishing governments in the recently insurgent States was one thing; the great principles upon which Congress proposed to proceed in establishing those governments was quite another thing, involving principles which lie at the very foundation of all that has been done, and which are intimately connected with all the results that must follow from that and from the legislation of Congress connected with the whole subject.

Mr. President, the first thing that was done was the passage of the thirteenth amendment, by which slavery in the United States was abolished. By that four millions of people

and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

FOURTH COUNT

On or about June 21, 1964, in Neshoba County, Mississippi, and within the Southern District of Mississippi, Lawrence Andrew Rainey, sheriff of Neshoba County, Mississippi, Cecil Ray Price, deputy sheriff of Neshoba County, Mississippi, Richard Andrew Willis, a patrolman of the Police Department of Philadelphia, Mississippi, Bernard L. Akin, Jimmy Arledge, Horace Doyle Barnette, Travis Maryn Barnette, Olen Lovell Burrage, James T. Harris, Frank J. Herndon, James E. Jordan, Edgar Ray Killen, Billy Wayne Posey, Alton Wayne Roberts, Jerry McGrew Sharpe, Jimmy Snowden, Jimmy Lee Townsend and Herman Tucker, while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Andrew Goodman, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Andrew Goodman summarily and without due process of law and for the purpose and with the intent of punishing Andrew Goodman for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Andrew Goodman of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law,

the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

In violation of Section 242 of Title 18 of the United States Code.

/s/ ROBERT E. HAUBERG,
United States Attorney,
/s/ ROBERT OWEN,
Special Attorney,
Department of Justice.

A True Bill:

/s/ DALLAS H. COWAN,
Foreman of the Grand Jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 59, 60

UNITED STATES OF AMERICA, APPELLANT

v.

CECIL RAY PRICE, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 4–7, 18–25) are not yet reported.

JURISDICTION

The judgments of the district court dismissing one indictment in its entirety as to all appellees (R. 8) and three counts of a second indictment as to fourteen of the appellees (R. 26–28) were entered on March 2, 1965. Notices of appeal to this Court were filed on the same day (R. 9–10, 28–29). On April 26, 1965, the Court entered an order postponing further consideration of the question of jurisdiction and consolidating these appeals (R. 30). The jurisdiction of this Court to review the decision of the district court on direct

appeal is conferred by 18 U.S.C. 3731. *United States* v. *Braverman*, 373 U.S. 405; *United States* v. *Hvass*, 355 U.S. 570.[1]

QUESTIONS PRESENTED

1. Whether the right, secured by the Fourteenth Amendment, not to be deprived of life or liberty without due process of law by persons acting under color of State law is a "right or privilege secured * * * by the Constitution" within the meaning of Section 241 of the Criminal Code.

2. Whether private individuals who act in association with public officials to carry out a scheme to deprive persons of rights protected by the Fourteenth Amendment are within the reach of Section 242 of the Criminal Code.

STATUTES INVOLVED

18 U.S.C. 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise

[1] The jurisdiction of this Court to entertain the direct appeal in No. 60 is not affected by the fact that Counts 2, 3 and 4 were dismissed only as to some of the defendants. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405; *United States* v. *Woodson*, 371 U.S. 12. The objections to jurisdiction interposed in response to the government's jurisdictional statement—all without substance—are discussed in note 4, *infra*, pp. 8–9.

or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

On January 15, 1965, the United States grand jury for the Southern District of Mississippi returned two indictments (R. 1–2, 11–16), each charging the same

eighteen persons [2] with offenses against the civil rights of Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, who were killed during the summer of 1964 in the vicinity of Philadelphia, Mississippi. Three of the defendants (Rainey, Price and Willis) were alleged to be State law enforcement officers then "acting by virtue of [their] official positions and under color of the laws of the State of Mississippi". There is no claim that the remaining defendants held public office.

1. The indictment in No. 59 (R. 1–2) involves a single count charging all the defendants with a criminal conspiracy in violation of 18 U.S.C. 241. It alleges that, between stated dates in 1964, the eighteen named persons (R. 2)—

> * * * conspired together, with each other and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each a citizen of the United States, in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.

---

[2] James E. Jordan, one of the defendants charged in the two indictments, was not before the district court and is not affected by the rulings below or the present appeals. His case was transferred to the United States District Court for the Middle District of Georgia under Rule 20, F.R. Cr. P.

The indictment further alleges the means by which the defendants planned to achieve the objects of their conspiracy.

The district court dismissed the indictment in its entirety, as to all defendants, on the ground that it did not state an offense against the United States (R. 8). Invoking an alternative ground of the ruling in *Williams* v. *United States*, 179 F. 2d 644 (C.A. 5), affirmed, in part on other grounds, 341 U.S. 70, the court held that Section 241 of the Criminal Code vindicates only "federally created rights", and does not embrace the Fourteenth Amendment right set forth in the indictment (R. 4–7).

2. The indictment in No. 60 (R. 11–16) is in four counts, each of which names all eighteen defendants. Count 1—which was sustained as to all defendants and is not in issue here—charges a violation of 18 U.S.C. 371 by conspiring to commit offenses defined in 18 U.S.C. 242. The present appeal is directed to the partial dismissal of Counts 2, 3 and 4, which charge substantive violations of Section 242.

The three substantive counts are identical, except that each involves a different victim. Thus, Count 2 (R. 13–14) charges that the several defendants—

> * * * while acting under color of the laws of the State of Mississippi, did wilfully assault, shoot and kill Michael Henry Schwerner, an inhabitant of the State of Mississippi, then and there in the custody of Cecil Ray Price, for the purpose and with the intent of punishing Michael Henry Schwerner summarily and without due process of law and for the purpose and

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with the intent of punishing Michael Henry Schwerner for conduct not so punishable under the laws of Mississippi, and did thereby wilfully deprive Michael Henry Schwerner of rights, privileges, and immunities secured and protected by the Constitution and the laws of the United States, namely, the right not to be deprived of his life and liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Mississippi and its agents and officers, the right and privilege to be immune from summary punishment without due process of law, and the right to be tried by due process of law for an alleged offense and, if found guilty, to be punished in accordance with the laws of the State of Mississippi.

The district court granted motions to dismiss Counts 2, 3 and 4 as to all the private defendants (while denying similar motions with respect to the three defendants who are law enforcement officers) (R. 26–28). The court read Section 242 as reaching only the acts of public officers while acting officially. In the court's view, no offense was stated against the private defendants because it was "not charged as an ultimate fact that [any of them] did anything as an official" or that the "individual defendants were officers in fact, or defacto in anything allegedly done by them 'under color of law' " (R. 19–20).

ARGUMENT

INTRODUCTION AND SUMMARY

These cases rest on a charge that the eighteen defendants—three of them State officials acting under color of their offices—jointly conceived and executed a plan against three citizens of the United States and inhabitants of Mississippi, then in State custody, that they be released, intercepted, assaulted and murdered. It is alleged that these acts violated rights guaranteed to the victims by the Due Process Clause of the Fourteenth Amendment and the defendants were accordingly indicted for entering into a conspiracy punishable under Section 241 of the Criminal Code (No. 59), and, in a second indictment (No. 60), for conspiring to violate Section 242 (Count 1) and for committing the substantive crime there defined as to each victim (Counts 2, 3 and 4).

On this appeal, there can be no question that a violation of the Fourteenth Amendment—at least by the three official defendants—has been adequately charged. Nor is it debatable that the Due Process rights described in the indictments have been sufficiently "made definite by decision or other rule of law" to support a criminal prosecution against those charged with "willfully" invading them. See *Screws* v. *United States,* 325 U.S. 91, 103; *Williams* v. *United States,* 341 U.S. 97, 101–102. So much is unchal-

lenged.[3] Indeed, those matters are foreclosed by the decision below sustaining the conspiracy count of the indictment under Section 242 and, with respect to the three State officers, the substantive charges of violating the same statute. Finally, there is no question as to the technical sufficiency of either indictment. The rulings below point out no pleading defect of that kind; they were squarely based on a construction of the statutes involved[4] and, in the circum-

[3] The indictment alleges more than ordinary murder for personal reasons by a group of individuals, some of whom happened to be holding State office. Not only is it alleged that the State law enforcement officers were acting under color of their office (R. 1, 11), but the charge is that they used their official powers to release State prisoners and turn them over to a lynch mob, which one of the officers shielded by his presence, with a view that they be summarily punished without benefit of trial (see R. 2, 12, 14, 14–15, 15–16). Thus, the case is plainly within the rule announced in *Screws* and the third *Williams* decision. That the death of the victims was the ultimate consummation of the conspiracy does not put in doubt the applicability of Section 242 is settled by *Screws*. The same question with respect to Section 241 (assuming it protects Fourteenth Amendment rights) is settled by *Logan* v. *United States*, 144 U.S. 263.

[4] There is accordingly no doubt about the jurisdiction of this Court to entertain the government's appeal. To be sure, the court below noted that the indictment in No. 59 alleged that the three State officers charged were "each acting at all times under 'color of laws'", whereas "[t]he statute mentions nothing about 'color of law' in the description of the crime embraced" (R. 4). But the suggestion that the court was pointing to a pleading defect and dismissed the indictment partly on that ground is frivolous. At worst, the allegation is surplusage which would support a motion to strike. F.R. Cr. P., Rule 7(d). In any event, it is plain the court was quarreling, not with

stances, no other issue is open on this direct appeal. See *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *Hvass*, 355 U.S. 570, 574. Only two questions remain:

1. The first is whether Section 241 reaches the invasion of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. If so, dismissal of the indictment in No. 59 must be reversed. No interpretation of the Constitution is required to sustain that charge. Three of the accused are State officials, alleged to have acted under color of their offices. They, of course, have the capacity directly to violate the Fourteenth Amendment. The others

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the wording of the indictment, but its theory—that Section 241 reaches Fourteenth Amendment rights.

Nor does the trial court's comment that the substantive counts of the indictment in No. 60 do not charge that the private defendants were "officers in fact, or de facto in anything allegedly done by them 'under color of law'" (R. 20) amount to a holding that the indictment was technically deficient in this respect. We are not questioning the court's reading of the indictment; our appeal is from the ruling that persons without official status are never amenable to Section 242, no matter how involved they may be in the crime of State officers. The answer to that question depends upon a construction of the substantive statute (read in the light of the Fourteenth Amendment) or of the aider or abettor statute (18 U.S.C. 2).

Finally, there is no merit to the suggestion that the direct appeal in No. 60 is defeated by the failure to plead the "aider and abettor" statute, 18 U.S.C. 2, which is now relied upon to sustain the substantive charges against the private defendants. It is well settled that an aider and abettor, made a principal by 18 U.S.C. 2, may be indicted as a principal. *Jin Fuey Moy* v. *United States*, 254 U.S. 189; *Nye & Nissen* v. *United States*, 168 F. 2d 846 (C.A. 9), affirmed, 336 U.S. 613.

are charged as co-conspirators who joined in a scheme to deprive the victims of their right "not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi" (R. 12). In No. 59, it does not matter whether or not they are themselves viewed as having acted "under color of law," for the only charge here is one of conspiracy and it is settled that a "person may be guilty of conspiring although incapable of committing the objective offense." *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Gebardi* v. *United States*, 287 U.S. 112, 121; *United States* v. *Holte*, 236 U.S. 140, 145. See, also, *United States* v. *Trierweiler*, 52 F. Supp. 4 (E.D. Ill.). Indeed, the court below so ruled with respect to the conspiracy count under Section 242 in No. 60, and the same principle obviously applies to Section 241 if it also reaches invasion of Fourteenth Amendment rights.

To repeat, the only question in No. 59 is one of statutory construction: Whether rights guaranteed by the Due Process Clause of the Fourteenth Amendment (and made specific by decisions of this Court) are "right[s] or privilege[s] secured * * * by the Constitution" within the meaning of Section 241. We answer that question in the affirmative on the basis of the language of the statute, its context, and its legislative history. Because the text itself, in its historical setting, so naturally lends itself to that reading, the principal burden of our argument on this point is a rebuttal of the several considerations recently summoned against such a construction.

2. The other issue arises only in No. 60—with respect to the dismissal of the substantive charges laid under Section 242 against the defendants without official status. Counts 2, 3 and 4 of the indictment allege that fifteen private persons, together with three State officials, committed the offense defined in Section 242. Although they were all formally described as "acting under color of the laws of the State of Mississippi" (R. 13–14, 14, 15), the court below correctly noted that "[t]he indictment states that three of the defendants were acting as officers in all that they did, but then does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'" (R. 20). The question is whether such private persons can be prosecuted under Section 242 when they act in association with State officials.

We present two answers to the ruling. First, we argue that the close association alleged between the private defendants and the State officials charged with them makes all of them amenable to the statute as persons acting "under color of law," albeit those without official status do not become de facto officers. Alternatively, we urge that the private defendants, even if incapable of violating the statute on their own in the circumstances of this case, are properly indicted as aiders and abettors of persons with capacity to commit the offense.

I

SECTION 241 OF THE CRIMINAL CODE PROTECTS RIGHTS SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The question whether Section 241 punishes conspiracies directed against Fourteenth Amendment rights was fully canvassed in this Court less than fifteen years ago in *United States* v. *Williams,* 341 U.S. 70, and the two major opinions in that case fully explored the arguments on each side of the issue. Against that background one hesitates to rehearse the considerations involved once again. If we do so briefly it is only because, on that occasion, the Court divided evenly and did not resolve the question—four Justices, in an opinion by Mr. Justice Frankfurter, expressing their view that Fourteenth Amendment rights were not within the scope of Section 241 (341 U.S. at 71–82), four other Justices, in an opinion by Mr. Justice Douglas, reaching the opposite conclusion (*id.* at 87–96), and Mr. Justice Black voting to affirm dismissal of the charge on independent grounds (*id.* at 85–86). Inevitably, our discussion will track much of the opinion of Mr. Justice Douglas in that case and will attempt to answer the objections raised by the opinion of Mr. Justice Frankfurter.

Section 241, among other things, punishes "persons" who conspire to interfere with the exercise or enjoyment by a "citizen" of "any right or privilege secured to him by the Constitution or laws of the United States." On its face, the provision is certainly broad enough to reach conspiracies directed against

Fourteenth Amendment rights, and its enactment less than two years after the ratification of that Amendment—as Section 6 of the Enforcement Act of 1870 (16 Stat. 140, 141)—would naturally support that inference. There is a heavy burden, it seems to us, on those who would encumber the straightforward text with a restrictive gloss to the effect that Section 241 does not protect all federal constitutional rights, including he rights then recently declared by the post-War Amendments.

The situation might be different if the narrow reading given Section 241 by the court below derived from a venerable tradition initiated by judges who were immediately familiar with the enactment of the provision. But that is not the case. Indeed, until *Williams,* there seems to have been no doubt expressed on the point. As Mr. Justice Douglas there noted (341 U.S. at 92–93), the early lower federal courts had taken it for granted that Section 241 covered Fourteenth Amendment rights. See *United States* v. *Hall,* 26 Fed. Cas. 79 (S.D. Ala); *United States* v. *Mall,* 26 Fed. Cas. 1147 (S.D. Ala.); *Ex parte Riggins,* 134 Fed. 404 (N.D. Ala.). And this Court had implied as much. There were first a series of cases involving prosecutions of private individuals under Section 241 for alleged violations of Fourteenth Amendment rights which were decided on constitutional grounds—presumably on the premise that the statute reached violations of the Amendment and that it was necessary to determine the scope of the constitutional provision.

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See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542; *Hodges* v. *United States*, 203 U.S. 1; *United States* v. *Wheeler*, 254 U.S. 281. Then came the decision in *Guinn* v. *United States*, 238 U.S. 347, where, in a case involving a congressional election, the Court upheld a prosecution under Section 241 which seems to have rested wholly on an alleged violation of the Fifteenth Amendment—which is no more within the scope of the statute than the Fourteenth Amendment if the restrictive view espoused in *William* is correct. On the same day, in *United States* v. *Mosley*, 238 U.S. 383, 387–388, the Court, speaking through Mr. Justice Holmes, characterized the "sweeping general words" of Section 241 as dealing "with Federal rights and with all Federal rights," "in the lump." The "broad language of the statute" was again noticed in *United States* v. *Classic*, 313 U.S. 299, and (albeit no Fourteenth Amendment rights were involved), the Court seems to have assumed that Section 241 (then § 19), like Section 242 (then § 20), protects all constitutional rights. And, as late as *Screws* v. *United States*, 325 U.S. 91— where the Court explicitly ruled that Section 242 protects rights guaranteed by the Due Process Clause of the Fourteenth Amendment—no one took issue with Mr. Justice Rutledge's statement that there are "no differences in the basic rights guarded" by Sections 241 and 242. *Id.* at 119. As Mr. Justice Douglas has fully shown (341 U.S. at 93–94), that decision also set at rest the objection that Section 241 must necessarily fail as unduly vague if construed to encompass Fourteenth Amendment rights.

Obviously the suggested limited scope of Section 241 does not appear on the surface—else three generations of judges would not have overlooked it until 1950. Accordingly, we must look on the words more critically and carefully assess them in their context. And, lest the true meaning lie buried still deeper, we must attempt to elucidate the sparse legislative history of the provision.

A. THE TEXT AND CONTEXT OF SECTION 241

The most convenient method for the initial inquiry is to parse Section 241, phrase by phrase, focusing on the restrictive implications attributed to each (by four of the Justices) in *Williams*.

1. *"Persons."* It has been suggested that characterization of the offenders under Section 241 as mere "persons" implies private individuals, acting on their own, rather than State officials or persons acting "under color of law," and that the provision therefore does not encompass Fourteenth Amendment rights which only those wielding State power can invade. See 341 U.S. at 76–78. The term "persons" was designedly used, it is said, to reach the members of the Ku Klux Klan, the acknowledged object of Senator Pool who wrote the provision in question. See *United States* v. *Mosley,* 238 U.S. 383, 387. The significance of that usage is further illumined—so goes the argument—when one notices that other provisions of the 1870 Act (where our provision originated as Section 6) carefully delineated the scope of coverage. Thus, Sections 2 and 3 of that Act were directed to "persons or officers" (16 Stat. 140) and

Section 17, now 18 U.S.C. 242, reached only "person[s] [acting] under color of * * * law" (16 Stat. 144).[5] The suggestion apparently is that there is a purposeful symmetry, dividing the measure into three neat categories of provisions—those which cover only governmental action, those which reach only private acts, and, finally, those which encompass both—and that all of this is confused, with resulting overlapping, if the modern Section 241 is not confined to rights which are secured by the federal Constitution or laws against private invasion.

Perhaps the short answer is that the entire argument is constructed upon the false premise that Congress can never reach invasion of Fourteenth Amendment rights by private persons. As we elaborate in *United States* v. *Guest*, No. 65, this Term, this was certainly not the assumption of those who wrote Section 241, nor do we think it a correct statement of constitutional law. But we do not rest there. Even accepting the proposition that all legislation under the Fourteenth Amendment must speak directly to the State or those acting under its authority, the argument derived from the use of the unqualified word "persons" in Section 241 does not hold up.

First, it is well settled that Section 241 reaches both private and public action—offenses of mere individuals acting on their own (*e.g.*, *Ex parte Yarbrough*, 110 U.S. 651; *United States* v. *Waddell*, 112 U.S. 76; *Logan* v. *United States*, 144 U.S. 263; *In re Quarles*,

[5] In the codification of Section 17 as Section 20 of the Criminal Code of 1909 (35 Stat. 1092), "person" became "whoever" and that change has been retained.

158 U.S. 532; *Motes* v. *United States*, 178 U.S. 458), and acts of State officials acting "under color of law." *E.g., Guinn* v. *United States*, 238 U.S. 347; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *United States* v. *Saylor*, 322 U.S. 385. That is an end of the distinction between the provisions of the 1870 Act which are directed solely against non-governmental action and those which encompass both officials and other wrongdoers. Section 241 has precisely the same scope as if it were explicitly addressed to "persons or officers."

Once that flaw is uncovered, the whole complicated edifice built upon the choice of the word "persons" falls of its own weight. If State officials are within the statutory coverage, we can no longer rely on Senator Pool's preoccupation with the Klan as implying an intention to restrict the provision to private conspiracies. Nor does fear of overlapping among the several provisions of the Enforcement Act of 1870 deter us, for, whether or not § 241 protects Fourteenth Amendment rights, overlapping is now inevitable with respect to the invasion of civil rights by State officials. See, *e.g., United States* v. *Classic, supra.* We need merely answer with Mr. Justice Holmes, speaking for the Court in *United States* v. *Mosley, supra,* 238 U.S. at 387: "Any overlapping that there may have been might well have escaped attention, or if noticed have been approved."

To be sure, there subsists a difference between the coverage of Section 241, which encompasses both private and official offenders, and Section 242, which reaches only persons acting "under color of any law,

statute, ordinance, regulation, or custom." These opening words of Section 242 were deemed appropriate (or necessary) when the provision (originally Section 17 of the Enforcement Act of 1870) protected only a limited category of Fourteenth Amendment equal protection rights.[6] But, of course, it does not

[6] As already noted, Section 242 derives from Section 17 of the Enforcement Act of 1870 (16 Stat. 144). In relevant part, that provision punished deprivations of "any right secured or protected" by Section 16 of the Act, which, in turn (tracking the language of the Civil Rights Act of 1866), guaranteed "all persons within the jurisdiction of the United States * * * the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."

The subsequent history of the provision is traced by Mr. Justice Rutledge in his concurring opinion in *Screws* v. *United States*, 325 U.S. 91, 120:

"At first §20 [now §242] secured only rights enumerated in the Civil Rights Act. The first ten years brought it, through broadening changes, to substantially its present form. Only the word 'willfully' has been added since then, a change of no materiality, for the statute implied it beforehand. 35 Stat. 1092. The most important change of the first decade replaced the specific enumeration of the Civil Rights Act with the present broad language covering 'the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States.' R.S. 5510. This inclusive designation brought §20 into conformity with §19's [now §241] original coverage of 'any right or privilege secured to him by the Constitution or laws of the United States.' Since then, under these generic designations, the two have been literally identical in the scope of the rights they secure. The slight difference in wording cannot be one of substance."

For the full text of each of the successive versions of Section 242—as well as Section 241—see the table appended to the opinion of Mr. Justice Frankfurter in *United States* v. *Williams*, 341 U.S. at 83.

follow that the absence of a similar restriction in a provision that protects rights secured against all categories of offenders forecloses protection of Fourteenth Amendment rights. The statute need not enumerate those with capacity to violate the Amendment: the Constitution itself does that. Indeed, since the substantive coverage of Section 242 was broadened to include all federal constitutional and statutory rights (see *Screws* v. *United States,* 325 U.S. 91, 120 (concurring opinion of Mr. Justice Rutledge)), the restriction of the provision to offenders wielding State power has become somewhat anomalous. Insofar as Section 242 now punishes invasion of rights also secured against private action (see *United States* v. *Classic,* 313 U.S. 299), there is plainly no constitutional necessity for the restriction and the consequence is that individual offenses against such rights are not federal crimes if no part of a conspiracy. There is certainly no warrant for imputing to the drafters of Section 241 the forced dilemma of covering Fourteenth Amendment rights, if at all, only by restricting their entire provision to State officers.

The upshot is that there is a certain overlapping between the predecessor of Section 241 and the other provisions of the Enforcement Act of 1870—the area of overlapping having increased since the expansion of Section 242. But, as already noted, that is not a sound argument against our reading of Section 241. The fact is that the Act of 1870 is not a symmetrical construction. It is a composite, hastily welded out of disparate pieces, attributable to a variety of spon-

sors, each with his particular concern.[7] As we shall see, Senator Pool, the author of our provision, had perhaps the broadest view and meant to cover all rights against all interference, including those rights recently declared by the Fourteenth Amendment, which he thought Congress might safeguard against both official and unofficial invasion.

2. *"Citizen."* Section 241 punishes only offenses against citizens of the United States. See *Baldwin* v. *Franks,* 120 U.S. 678. Hence, it is argued that the provision is concerned alone with rights appertaining to national citizenship, not including the Fourteenth Amendment rights to due process and equal protec-

[7] Thus, Sections 1–4 of the Act—which are concerned solely with the right to vote—derive from the parent bill reported by the Senate Judiciary Committee as a substitute for other voting measures before the Senate. Cong. Globe, 41st Cong., 2d Sess., pp. 2942, 3479–3480. Sections 16 and 17—which reenacted provisions of the Civil Rights Act of 1866 and ultimately became Section 242 of the Criminal Code—are traceable to an amendment submitted by Senator Stewart of Nevada. *Id.*, p. 3480. And Section 6—now our Section 241—, together with Section 7, was proposed by Senator Pool. *Id.*, pp. 3612, 3679. There were many other amendments, besides. See *id.*, p. 3688 (comment of Senator Trumbull). Just before the bill was finally passed (*id.*, p. 3688), one Senator characterized it as "a conglomeration of incongruities and contradictions" and claimed no one knew its true content in light of the number of amendments hastily adopted (*ibid.*, Senator Thurman). Another member accurately stated: "The bill as it now stands is the child of many fathers. It is a piece of patchwork throughout." *Ibid.* (Senator Casserly). See, also, the opinion of Mr. Justice Frankfurter in *United States* v. *Williams, supra,* at pp. 74–75, and n. 2.

tion which are not derived from citizenship or restricted to citizens. And, again, a contrast is made with Section 242 which, like the Fourteenth Amendment itself, expressly protects every "inhabitant" of the land, citizen or not.

Significantly, this argument has never gained a foothold in this Court. Although the court of appeals, in *Williams*, had stressed the fact that Section 241 protects only the rights of citizens (see 179 F. 2d at 647), nothing was made of the point by Mr. Justice Frankfurter when the case came here. That is doubtless because the argument immediately runs into an insuperable barrier when we notice that, of all the rights held to be protected by Section 241, none is peculiar to citizens. It is so with respect to the right to vote in congressional elections (*Ex parte Yarbrough, supra; Guinn* v. *United States, supra; United States* v. *Mosley, supra; United States* v. *Classic, supra; United States* v. *Saylor, supra*), which is not derived from citizenship or necessarily restricted to citizens. *Minor* v. *Happersett*, 21 Wall. 162; *Pope* v. *Williams*, 193 U.S. 621, 632–633. And the same is true of the right to peaceful enjoyment of federal homesteads (*United States* v. *Waddell, supra*) which were open to aliens who had merely declared their intention to become citizens (Rev. Stat. 2289), of the right to be secure against unauthorized violence when in federal custody (*Logan* v. *United States, supra*), and of the right to inform on violations of the Federal tax

laws (*In re Quarles, supra; Motes* v. *United States, supra*).[8]

We can speculate why Section 241 was written to protect citizens alone. Perhaps there was a conscious purpose to avoid encompassing Indians who were not generally viewed as naturalized by the Fourteenth Amendment. See *Elk* v. *Wilkins*, 112 U.S. 94; James, *The Framing of the Fourteenth Amendment* (1956), p. 143. But, without doubt, the primary focus was on the Negro in the reconstructed States, recently emancipated and now granted citizenship; for that purpose, it was enough to protect all citizens. Section 242, on the other hand, was explicitly written to protect aliens as well as Negro citizens, as the text makes clear. Moreover, in using the word "inhabitant" it was merely tracking the language of the Civil Rights Act of 1866 (14 Stat. 27) which assured the recently emancipated slaves, not yet citizens, some of the same

[8] Mr. Justice Frankfurter's opinion for four members of the Court in *Williams* can be read as characterizing the right to vote in federal elections and the rights vindicated in *Logan*, *Quarles* and *Motes* as rights of national citizenship (see 341 U.S. at 77, 79–80). While that description would not be wholly accurate, the point is not important in light of the explicit recognition that the right involved in *United States* v. *Waddell*, *supra*, "did not pertain to United States citizenship" (*id.* at 80), and the conclusion of the opinion that the category of rights protected by Section 241 are those "arising from the substantive powers of the Federal Government" (*id.* at 73, 77, 78, 79, 82)—rather than only those appertaining to national citizenship. In *United States* v. *Guest*, No. 65, this Term, we note our difficulty with the proposition that the Fourteenth Amendment (and presumably also the Fifteenth) did not—by its Fifth Section—enlarge the "substantive powers" of the national government. See Brief for the United States, pp. 18–46.

rights as were "enjoyed by white citizens". See note 6, *supra*, p. 18. In sum, the substantive coverage of these provisions does not depend on the class of persons protected: just as Section 242 originally secured a narrow group of rights for everyone, Section 241 protects only a limited class (citizens) but with respect to all federal rights.

3. "*[R]ight or privilege [granted or] secured * * * by the Constitution or laws of the United States.*" As originally enacted (as Section 6 of the Act of 1870), Section 241 was directed at the invasion of "any right or privilege granted or secured" to citizens by the federal Constitution or statutes. The word "granted" was dropped four years later when the federal statutes were revised. See Rev. Stat. § 5508. Presumably, this was done on the ground that the word "granted"—at best a mere alternative descriptive separated by a disjunctive—was surplusage, for the "revision" of 1874 was not meant to alter substance. See 14 Stat. 74; 16 Stat. 96. Nevertheless, apparently focusing on that word, and contrasting the present language of Section 242 ("rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"), it has been argued that the "narrow phase" of Section 241 does not cover Fourteenth Amendment rights. See 341 U.S. at 78.

The proposition is difficult to grasp. Insofar as any contrast between the language of Section 241 and Section 242 is appropriate, the argument seems reversed. Indeed, if one or the other of the two provisions must be restricted to rights of national citizenship, an echo of the "privileges or immunities"

clause of the Fourteenth Amendment is more obvious in Section 242 ("rights, privileges, or immunities") than in Section 241 ("right or privilege"). And the absence of the word "granted" in Section 242 and its presence in the predecessor of Section 241 suggests, if anything, that the former provision deals only with pre-existing rights inherent in national citizenship, not conferred by the Fourteenth Amendment, but merely re-affirmed by it and guaranteed (somewhat redundantly) against contrary State laws, whereas the latter section (§ 241) protects the new constitutional rights declared for the first time by the Due Process and Equal Protection Clauses of the Amendment.

But the comparison, in any event, is wholly misleading, for the two texts put in opposition are not of the same date. The phrase "secured or protected" in Section 242 is directly derived from the Civil Rights Act of 1866 (see note 6, *supra*, p. 18) written some years before Section 241. That the rights involved are not described as "granted" may well be due to the fact that there, as well as in the 1870 text, the direct reference was to a previous section of the same statute—not the Constitution—which was viewed as merely implementing rights already conferred by the Thirteenth or Fourteenth Amendment. The rest of the quoted language of Section 242 was substituted in 1874 for a longer and very different phrase of apparently narrower content in the original provision of 1870. See note 6, *supra*, p. 18. And at the same time that new text came into the law the word "granted" was deleted from Section 241.

Plainly nothing can be learned by now comparing the language of two provisions which have wholly different verbal histories.

Comparisons aside, there is nothing in the characterization of the rights protected by Section 241 which excludes the rights to due process and equal protection conferred by the Fourteenth Amendment. To be sure, the Due Process and Equal Protection Clauses did not grant absolute rights, good against the world: the Amendment only deals with the relationship between the inhabitant and the State. But even if they run only against the State, these are nevertheless properly termed "rights," "granted," or at least "secured" by the Constitution. As this Court said in the *Civil Rights Cases,* 109 U.S. 1, 11, "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment." See, also, *Strauder* v. *West Virginia,* 100 U.S. 303, 307–308; *Ex parte Virginia,* 100 U.S. 339, 345. That this was the usage of the time is illustrated by Section 17 of the 1870 Act (the predecessor of § 242) which referred to the equal protection guarantees enumerated in the previous section as "right[s] secured or protected" by that provision. Note 6, *supra,* p. 18.

B. THE LEGISLATIVE HISTORY OF SECTION 241

We have seen that the most painstaking analysis of the text of Section 241, viewed alone and in the context of the statute where it originated, merely confirms what the language, on its face, indicates: that the provision broadly punishes conspiracies interfering with all federal rights, including those declared by the Fourteenth Amendment. It only re-

mains to notice that the immediate legislative history of Section 241 fully supports that conclusion.

We begin with the seemingly decisive fact that Senator Pool, introducing Section 241 in its original form, explicitly referred to "rights which are conferred upon the citizen by the fourteenth amendment" as among those covered by his provision. Cong. Globe, 41st Cong., 2d Sess. 3611; *id.*, at 3613 (App., *infra*, pp. 43, 48).* There is no explaining away that statement. In context, it is clear that the sponsor of the provision had in mind the rights conferred by the Due Process and Equal Protection Clauses and not, as has been suggested (341 U.S. at 76–77, n. 4), the pre-existing rights of national citizenship available for the first time to those whom the Amendment made citizens and now expressly guaranteed against State invasion by the new Privileges and Immunities Clause. The indications are numerous.

First, Senator Pool expressly invoked the language of the due process and equal protection guarantees of the Amendment. He showed his particular concern with the Equal Protection Clause by stressing the use of the word "deny" in that provision "in contradistinction" to the mere prohibition against a State "making or enforcing laws" abridging the privileges and immunities of national citizenship in the first clause—arguing that here the State's obligation was affirmative and that, in the event of default, con-

*We have reproduced as an appendix (*infra*, pp. 37–50) the whole of Senator Pool's speech introducing the amendment which became Section 6 of the Enforcement Act of 1870, and, ultimately, Section 241 of the Criminal Code. It is the only pertinent text of legislative history.

gressional power was therefore greater. *Id.*, at 3611 (App., *infra*, pp. 40–41). In light of later decisions, beginning with the *Slaughter-House Cases*, 16 Wall. 36, the Senator was of course correct in neglecting the rights "conferred" by the Privileges and Immunities Clause: whatever they are, they pre-existed the Fourteenth Amendment and could be secured against State invasion without benefit of the new Amendment.

Again, in the same passage, Senator Pool makes repeated reference to the Civil Rights Act of 1866 and indicates that those rights, among others, are those which his measure will protect. *Ibid.* As we know, those are basically equal protection rights, now vindicated (along with rights derived from the Due Process Clause of the Fourteenth Amendment and others) by Section 242.

Finally, the sponsor's purpose to protect the right secured by the Fifteenth Amendment against the action of hostile conspiracies is unmistakable. *Ibid.* (App., *infra*, pp. 40–43). Yet, that right is no more a right "appertaining to national citizenship" or one derived "from the substantive powers of the federal government" than are those secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Having strayed so far from the narrow category of rights it is said he was concerned with, it seems highly unlikely that the sponsor should have stopped short of including all Fourteenth Amendment rights—which he mentions in one breath with the right secured by the Fifteenth Amendment. *Id.*, at 3611, 3613 (App., *infra*, pp. 40, 43, 48).

To be sure, Senator Pool believed the rights protected by his bill could be secured against private in-

terference as well as State denial. *Id.* at 3611–3613 (App., *infra,* pp. 38–49). But that does not tend to indicate that he meant to exclude rights derived from those constitutional provisions which are explicitly directed to States alone. As we have noted, he meant to cover the right guaranteed by the Fifteenth Amendment which presents the identical problem. See *James* v. *Bowman,* 190 U.S. 127. Plainly, he thought that Congress might legislate to protect Fourteenth and Fifteenth Amendment rights against the action of private conspiracies whenever the State had failed ot effectively secure those rights. We advance a like contention in *United States* v. *Guest,* No. 65, this Term. Whether he was right or wrong, however, does not matter here. The provision enacted is carefully limited to "rights secured by the Constitution"; its scope is measured by the constitutional provision involved. As Mr. Justice Holmes noted in *United States* v. *Mosley, supra,* 238 U.S. at 387, here "Congress put forth all its powers"; it meant to afford all possible protection but it was careful not to overstep the constitutional line, wherever it might later be drawn.

II

SECTION 242 OF THE CRIMINAL CODE REACHES PRIVATE INDIVIDUALS WHO ACT IN ASSOCIATION WITH STATE OFFICERS TO CARRY OUT A SCHEME TO INVADE RIGHTS SECURED BY THE PROVISION.

As we have already noted, the two indictments before the Court clearly charge violations of specific rights guaranteed by the Fourteenth Amendment. It is settled that such conduct "under color of law," if

done willfully as here alleged, contravenes Section 242 of the Criminal Code. *Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United States,* 341 U.S. 97. Accordingly, the court below sustained the indictment in No. 60 with respect to the defendants who hold State office and were alleged to be acting officially (albeit illegally). But—while upholding as to all the charge of conspiring to violate Section 242—the court dismissed the substantive charges against the private defendants on the ground that they lacked capacity to commit the offense defined by Section 242. We think the ruling erroneous, first, because, in the circumstances alleged, the private defendants, although not State officials, were acting "under color of law" within the meaning of the statute; and, second, because, regardless of their capacity to themselves commit the offense, they are amenable to Section 242 as aiders and abettors of the State officials charged.

A. The trial judge correctly observed that the indictment in No. 60 does not claim that fourteen of the defendants were public officials of the State of Mississippi, de jure or de facto. On the other hand, the substantive counts (R. 13–16) explicitly charge that each of the defendants, including those who held no official position, were "acting under color of the laws of the State of Mississippi," and the indictment, as a whole, alleges that all of them were joint conspirators, the private defendants acting in close association with those who were law enforcement officers, one of whom was present at all times and presumably lent the protective umbrella of his office to all that

was done. Thus, it is apparent that the court below held that private persons are never amenable to the sanctions of Section 242, no matter what the circumstances. Otherwise, the allegation of action "under color of law", in the language of the statute, should have required upholding the charge. In effect, the ruling is that none but State officers can act "under color of law" within the meaning of Section 242. The proposition, we submit, is untenable.

Certainly, nothing in the nature of the rights protected by Section 242 requires confining its reach to State officers in all circumstances. Indeed, it has long been settled that the conduct of private persons may be subject to the prohibitions of the Fourteenth Amendment if the State, through its officers, "has so far insinuated itself into a position of interdependence * * * that it must be recognized as a joint participant in the challenged activity." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. There are many variations, *E.g., Pennsylvania* v. *Board of Trusts,* 353 U.S. 230; *Peterson* v. *City of Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Griffin* v. *Maryland,* 378 U.S. 130; *Robinson* v. *Florida,* 378 U.S. 153. But the basic situation is always the same: a private activity falls within the scope of the Fourteenth Amendment because—albeit without assuming full official status or altogether losing its private character—it becomes involved in a "joint venture" of sorts with the State. That is our case.

If the scope of action "under color of law" is coextensive with "State action" under the Fourteenth

Amendment—as is usually tacitly assumed [10]—the decisions just cited end the question. But there are, in any event, like rulings construing the phrase "under color of law" in 18 U.S.C. 242 or its civil counterpart, 42 U.S.C. 1983—where it has the same meaning. *Monroe* v. *Pape,* 365 U.S. 167, 185. Thus, in *Baldwin* v. *Morgan,* 251 F. 2d 780, 788 (C.A. 5), the court rejected a claim that private persons were not acting "under color of any law" in these words:

> State action is indeed required under the Fourteenth Amendment and 42 U.S.C.A. § 1983. But those who directly assist the admitted state agency in carrying out the unlawful action become a part of and subject to the sanction of Section 1983. * * *

See, also, *Smith* v. *Holiday Inns of America,* 336 F. 2d 630 (C.A. 6); *Hampton* v. *City of Jacksonville,* 304 F. 2d 320 (C.A. 5); *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C.A. 4); *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

[10] Thus, most of the modern cases construing the Fourteenth Amendment were filed under 28 U.S.C. 1343(3) which gives the district courts jurisdiction of civil cases to redress deprivation of constitutional rights "under color of any State law, statute, ordinance, regulation, custom or usage," and the injunction was sought and granted under 42 U.S.C. 1983 which provides for equitable relief from a deprivation of constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." See, *e.g.*, *Turner* v. *City of Memphis,* 369 U.S. 350, 351; *McNeese* v. *Board of Education,* 373 U.S. 668, 671; *Reynolds* v. *Sims,* 377 U.S. 533, 537. The assumption apparently indulged is that whatever violates the Amendment necessarily was done "under color of law."

Closest in point, perhaps, is *United States* v. *Lynch*, 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5), certiorari denied, 342 U.S. 831, a case strikingly similar to ours. There, it was charged that a sheriff and his deputy arrested several persons and "turn[ed] them over to a hooded group in disguise to be beaten." On these facts the court held:

> While it is true that one must be acting under color of state law in order to violate Section 242, and that ordinarily a private citizen would not act under color of law, it is also true that the presence of state officers and their active participation with other defendants who were not officers would furnish the "color of law" required as to all the defendants. [94 F. Supp. at 1014.][11]

We conclude, as in *Lynch*, that when the private members of the mob knowingly linked hands with the officers to carry out a common plan to deprive Schwerner, Goodman and Chaney of their constitutional rights they lost their claim to be treated as mere private citizens. Having united with State officials and invoked the protective umbrella of their presence, the private defendants were acting "under color of law" and became amenable to the sanctions of Section 242.

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[11] See, also, *Downie* v. *Powers*, 193 F. 2d 760 (C.A. 10), where the court held that "* * * a wilful or purposeful failure of the Chief of Police or other City officials to preserve order, keep the peace, and to make the Jehovah's Witnesses secure in their right to peaceably assemble, would undoubtedly constitute acquiescence in, and give color of law to, the actions of the mob." 193 F. 2d at 764. And see *Williams* v. *United States*, 179 F. 2d 656 (C.A. 5), affirmed, 341 U.S. 97.

B. In addition, the substantive charges against the private defendants should have been sustained on the ground that they may have been aiders and abettors of the State officers jointly indicted. While that relationship is suggested by the language of indictment, it is true that the private defendants are formally charged as principals, as themselves acting "under color of the laws of the State of Mississippi." But, as already noted (note 4, *supra*, p. 9), indictment as a principal is no bar to conviction as an aider or abettor (which, in turn, permits punishment as a principal).[12]

The governing principle that one without capacity to commit an offense may nevertheless be convicted if he aided and abetted its commission is well settled. The rule is embodied in 18 U.S.C. 2(a) which provides that "[w]hoever * * * aids, abets, counsels, commands, induces, or procures [the] commission [of an offense against the United States] is punishable as a principal." Whatever doubt there may have been that persons lacking capacity to commit the substantive offense were covered was removed in 1951 when the

[12] See, in addition to the authorities cited at note 4, *supra*, p. 9, *United States* v. *Russo*, 284 F. 2d 539 (C.A. 2); *Swanne Soon Young Pang* v. *United States*, 209 F. 2d 245 (C.A. 9); *United States* v. *Knickerbocker Fur Coat Co.*, 66 F. 2d 388 (C.A. 2); *Melling* v. *United States*, 25 F. 2d 92 (C.A. 7); *DiPreta* v. *United States*, 270 Fed. 73 (C.A. 2); *Vane* v. *United States*, 254 Fed. 32 (C.A. 9); *United States* v. *Snyder*, 14 Fed. 554 (D. Minn.); *United States* v. *Palermo*, 172 F. Supp. 183 (E.D. N.Y.); *United States* v. *J. R. Watkins Co.*, 127 F. Supp. 97 (D. Minn.); *United States* v. *Selph*, 82 F. Supp. 56 (S.D. Cal.); *United States* v. *Decker*, 51 F. Supp. 20 (D. Md.).

aider and abettor statute was amended to read as it does now. The report accompanying that legislation (S. Rep. No. 1020, 82d Cong., 1st Sess., p. 7) explicitly states:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. * * *

The judicial decisions are in accord. See *Wilson* v. *United States,* 230 F. 2d 521, (C.A. 4); *Koehler* v. *United States,* 189 F. 2d 711, (C.A. 5); *May* v. *United States,* 175 F. 2d 994 (C.A. D.C.); *Haggerty* v. *United States,* 5 F. 2d 224 (C.A. 7); *Barron* v. *United States,* 5 F. 2d 799, (C.A. 1); *United States* v. *Snyder,* 14 Fed. 554 (D. Minn.); *United States* v. *Melekh,* 193 F. Supp. 586, (N.D. Ill.); *United States* v. *Bayer,* 4 Dill. 407, 24 Fed. Cas. 1046 (D. Minn.). The *Wilson* and *Snyder* cases make it clear that the rule applies when the aider and abettor is incapable of committing the offense because he is not acting "officially" or does not hold the described public office. Thus, in *Wilson,* the statute (now 18 U.S.C. 201) reached only the solicitation or acceptance of bribes by a government officer acting in his "official capacity" and the court sustained the conviction of one who claimed not to be so acting on the alternative ground that he was, in any event, punishable as an aider or abettor. And in *Snyder,* a co-defendant who was not himself a postmaster but had aided and abetted the postmaster was held accountable under a statute that punished "[a]ny post-

master who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation."

The same rule applies with respect to Section 242. Thus, in *Koehler* v. *United States, supra,* a State officer and one Ackermann, who was a private individual,[13] were jointly indicted for violating Section 242 and the court sustained Ackermann's conviction for having "aided, abetted and counseled Koehler in the commission of this offense", finding that the "evidence conclusively reveals that Ackermann and Koehler were acting in concert in perpetrating the offense" and that Ackermann was "assisting" Koehler. 189 F. 2d at 712–714. Likewise, in *United States* v. *Lynch,* 94 F. Supp. 1011 (N.D. Ga.), affirmed, 189 F. 2d 476 (C.A. 5), certiorari denied, 342 U.S. 831, some of the defendants were police officials and others were private citizens. In answer to the private defendants' argument that they could not violate Section 242 "because it related only to deprivations by a state," the district court ruled (94 F. Supp. at 1013):

> True, Section 242 was enacted pursuant to the Fourteenth Amendment and relates to deprivations by states (acting through state officials) and not to acts of private individuals. It does

[13] Although the *Koehler* opinion itself does not explicitly state that Ackermann was a private person, a subsequent opinion of the same court describes the *Koehler* case as one "in which a private citizen assisted a constable in a brutal assault and unlawful imprisonment * * *" *Baldwin* v. *Morgan,* 251 F. 2d 780, 789 (C.A. 5). Thus the court below was in error when, in referring to the *Koehler* case, it stated that "Ackermann was not a mere private citizen * * *" (R. 21).

not follow, however, that private individuals cannot be guilty as principals if they aid and abet state officers in such violations. Section 2, Title 18, United States Code Annotated.

CONCLUSION

For the foregoing reasons, the judgments of the district court dismissing the indictment in No. 59 in its entirety and parts of three counts of the indictment in No. 60 should be reversed and the causes remanded for trial.

Respectfully submitted.

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APPENDIX

Remarks of Senator Pool of North Carolina on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611–3613).

Mr. POOL. Mr. President, the question involved in the proposition now before the Senate is one in which my section of the Union is particularly interested; although since the ratification of the fifteenth amendment, which we are now about to enforce by appropriate legislation, other sections of the country have become more or less interested in the same question. It is entering upon a new phase of reconstruction; that is, to enforce by appropriate legislation those great principles upon which the reconstruction policy of Congress was based.

I said upon a former occasion on this floor that the reconstruction policy of Congress had been progressive, and that it was necessary that it should be progressive still. The mere act of establishing governments in the recently insurgent States was one thing; the great principles upon which Congress proposed to proceed in establishing those governments was quite another thing, involving principles which lie at the very foundation of all that has been done, and which are intimately connected with all the results that must follow from that and from the legislation of Congress connected with the whole subject.

Mr. President, the first thing that was done was the passage of the thirteenth amendment, by which slavery in the United States was abolished. By that four millions of people

were taken out from under the protecting hand of interested masters and turned loose to take care of themselves. They were turned loose and put upon their own resources in communities which were imbued with prejudices against them as a race, communities which for the most part had for years past—indeed from the very time when those who are now in existence were born—been taught and had instilled into them a prejudice against the equality which has been attempted to be established for the colored citizens of the United States.

Mr. President, the condition which that thirteenth amendment imposed on the late insurrectionary States was one which demanded the serious consideration and attention of this Government. The equality which by the thirteenth, fourteenth, and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of the prejudices which had theretofore existed, but it has raised against them still stronger prejudices and stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people, weak, ignorant, and poor. Those among the white citizens there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is for that reason not only necessary for the freedmen, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction.

We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purposes, of intimidating and coersing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to on the part of those who are oppressed. Sir, the time will come when retaliation will be resorted to unless the Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. It speaks of "the right of citizens to vote." It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can individuals abridge it with impunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. If our legislation is to apply only to the States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must ap-

ply to individuals. A State might attempt to contravene that provision of the Constitution by passing some positive enactment by which it would be contravened, but the Supreme Court would hold such enactment to be unconstitutional, and in that way the State would be restrained. But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.

The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. The civil rights bill recognized all persons born or naturalized in the United States as citizens, and provided that they should have certain rights which were enumerated. They are, "to make and enforce contracts, to sue, be made parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property," and to "the full and equal benefit of all laws and proceedings for the security of person and property."

The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, "to subject, or cause to be

subjected, any citizen to the deprivation of any of the rights secured and protected" by the act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. And so, under the fourteenth amendment to the Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article."

There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer to execute any law of a State by

which he trespasses upon any of these rights of the citizen it operates upon him as a citizen, and not as an officer. Why can you not just as well extend it to any other citizen of the country?

It is, in my judgment, incumbent upon Congress to pass the most stringent legislation on this subject. I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.

There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in section two of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. I believe the language of the Senate bill is sufficiently large and comprehensive to embrace any other class of officers that might be charged with any act that was necessary to enable a citizen to perform any prerequisite to voting.

But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the fifteenth amendment.

But, sir, there is a great, important omission in this bill as well as in that of the House. It seems not to have struck those who drew either of the two bills that the prevention of the exercise of the right of suffrage was not the only or the main trouble that we have upon our hands. Suppose there shall be an organization of individuals, or, if you please, a single individual, who shall take it upon himself to compel his fellow citizens to vote in a particular way. Suppose he threatens to discharge them from employment, to bring upon them the outrages which are being perpetrated by the Kuklux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. It seems to me it is necessary that we should legislate against that. That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books for taxation or of depositing the ballot in

the box. I think the bill cannot be perfected to meet the emergencies of the occasion unless there be a section which meets that view of the case.

The Senator from Indiana [Mr. Morton] asks whether I have drawn an amendment to that effect. I have, but I cannot offer it at this time, for the simple reason that there is an amendment to an amendment pending.

Mr. MORTON. Let it be read for information.

Mr. POOL. It has been printed, and I send it to the desk to be read for information.

The Chief Clerk read the amendment intended to be proposed by Mr. Pool, as follows:

"Insert after section four of the Senate bill the following sections:

"SEC. 5. *And be it further enacted,* That it shall be unlawful for any person, with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate, or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory. Any person violating the provisions of this section shall be held guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court: the fine not to exceed $1,000, and the imprisonment not to exceed one year.

SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, and on conviction thereof shall be fined and imprisoned; the fine not to exceed $5,000 and the imprisonment not to exceed ten

years; and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 7. *And be it further enacted,* That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States, as hereinafter provided, for violations of this act, and on conviction thereof shall be punished for the same with such punishments as are attached to like felonies, crimes, and misdemeanors by the laws of the State in which the offense may be committed.

"Strike out section twelve and substitute therefor the following:

"*And be it further enacted,* That the President of the United States, or such person as he may empower for that purpose, may employ in any State such part of the land and naval forces of the United States, or of the militia, as he may deem necessary to enforce the complete execution of this act; and with such forces may pursue, arrest, and hold for trial all persons charged with the violation of any of the provisions of this act, and enforce the attendance of witnesses upon the examination or trial of such persons."

* * * * *

Mr. POOL. The Senator from Indiana asked if I had an amendment prepared which met the view of the case I was presenting in regard to the compelling of citizens to vote in a particular way. The first section of the amendment which I have offered uses this language:

"That it shall be unlawful for any person with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate or attempt to coerce or intimidate

any of the legally qualified voters in any State or Territory."

But, Mr. President, there is another view which seems to have been lost sight of entirely by those who have drawn both the House bill and the bill now pending before the Senate, and from which we apprehend very much danger. It is this: the oppression of citizens because of having voted in a particular way, or having voted at all. It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by their employers. They may be subjected to outrages of various kinds because they have participated in an election, and cast their votes in a particular way. That is not done for the purpose of punishment so much as for the purpose of deterring them from voting in any succeeding election, or from voting in a way that those who perpetrate these outrages do not desire them to do. I find that branch of the subject is entirely left out of view in the bill.

There is another feature of my amendment which I deem of some importance. It is this:

"That if in the act of violating any provision in either of the two preceding sections any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States."

I think the most effective mode of preventing this intimidation and these attempts at coercion, as well as the outrages which grow out of these attempts, would be found in making any offense committed in the effort to violate them indictable before the courts of the United States. As was said before, in the discussion of the Georgia question in the Senate, the juries in the communities where these outrages are committed are often composed of men who are engaged in them, or of their friends, or of those

who connive at them, or of persons who are intimidated by them, and in many instances they dare not bring in a true bill when there is an attempt to indict, or if a true bill be found, they dare not go for conviction on the final trial. It is for that reason that I believe it will be better, it will be the only effective remedy, to take such offenders before the courts of the United States, and there have them tried by a jury which is not imbued with the prejudices and interests of those who perpetrate the crimes.

These are the principal features of the amendment which I have drawn in the effort to perfect this bill; and there is another one to which I will call the attention of the Senate. It is that in regard to calling out the military forces of the United States. I find that in the civil rights bill, as in the bill which has been introduced by the Senate Judiciary Committee, the President is authorized, either by himself or by such person as he may empower for that purpose, to use the military forces of the United States to enforce the act. There in both instances it stops. It has been objected to here that the expression, "or such other person as he may empower for that purpose," should not be in the bill; that it may be subject to abuse. I think it would have no good effect to keep that language in. The President may send his officers and he may empower whomsoever he pleases to take charge of his forces without any such provision.

But there is a use for these forces which seems not to have been averted to in either the civil rights bill or in the bill that is now pending before the Senate. It is the holding of these offenders for examination and trial after they are arrested. Their confederates, if they are put in the common prison of the State, will in nine cases out of ten release them. But more important still is it to use these forces to com-

pel the attendance of witnesses; for a subterfuge resorted to is to keep witnesses away from the trial. In many instances witnesses are more or less implicated in the commission of the offense. In other cases the witnesses are intimidated and cannot be obtained upon the trial. So in the amendment which I have prepared I have proposed that these forces may be used to enforce the attendance of witnesses both upon the examination and the trial. My purpose in introducing this was to perfect the Senate bill. I think, as I said yesterday, that that bill is liable to less objection than the House bill. I think it is more efficacious in its provisions. I think it is better that the Senate should direct its attention to perfecting that bill, in order that it may be made, when perfected, a substitute for the bill that came from the House.

That much being said upon the purpose of perfecting the bill and making it efficacious, I have very little more to say. I did not intend when I rose to say much upon the general power, which has been questioned here, to pass any law at all. I think it is better to do nothing than to do that which will not have the proper effect. To do that which will not accomplish the purpose would be worse than doing nothing at all. That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be restored to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon

their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this Union. I think this question will come time and again as years pass by, perhaps before another year, in different forms before the Senate. It is well that we should deal with it now and deal with it squarely, and I hope that the Senate will not hesitate in doing so.

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, shoud not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.

Upon that ground the Republican party must stand in carrying into effect the reconstruction policy, or the whole fabric of reconstruction, with all the principles connected with it, amounts to nothing at all; and in the end it will topple and fall unless it can be enforced by the appropriate legislation, the power to enact which has been provided in each one of the great charters of liberty which that party has put forth in its amendments to the Con-

stitution. Unless the right to enforce it by appropriate legislation is enforced stringently and to the point, it is clear to my mind that there will be no efficacy whatever in what has been done up to this time to carry out and to establish that policy.

I did not rise, sir, for the purpose of arguing the question very much in detail. I did not rise for the purpose of making any appeals to the Senate; but more for the purpose of asserting here and arguing for a moment the general doctrine of the right of the United States to intervene against individuals in the States who attempt to contravene the amendment to the Constitution which we are now endeavoring to enforce, and for the purpose of calling attention to the defects in the bill and offering a remedy for them.

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Nos. 59, 60

In the Supreme Court of the United States

October Term, 1965

UNITED STATES OF AMERICA, Appellant

v.

CECIL RAY PRICE, Et Al

Appeals from the United States District Court for the Southern District of Mississippi, Eastern Division

BRIEF FOR THE APPELLEES

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Nos. 59, 60

In the Supreme Court of the United States

October Term, 1965

UNITED STATES OF AMERICA, Appellant

vs.

CECIL RAY PRICE, Et Al, Appellees

BRIEF FOR THE APPELLEES

The opinions of the District Court appear at record page 4-7, 18-25, and are not reported.

JURISDICTION

The jurisdiction of this Honorable Court to review the decision of the District Court on direct appeal in case number 59 is conceded.

QUESTIONS PRESENTED

No. 1. Does Section 241 of Title 18 of the United States Code encompass the due process clause of the Fourteenth Amendment, by an extention to an interference with the privileges and immunities of one citizen as against another citizen to be free of an assault and battery and/or murder inflicted by one citizen against another citizen?

No. 2. Whether the decision of the District Court in case number 60 was based, at least in part, on an in-

terpretation of the indictment, and there being, therefore, no statute construed by the District Court, whether the Court on this appeal in case number 60 has jurisdiction.

STATUTES INVOLVED

The statutes involved as presented to the District Court are 18 U. S. C. 241, 18 U. S. C. 242, and 18 U. S. C. 371, together with the Fourteenth Amendment to the Constitution of the United States.

18 U. S. C. 241 provides:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U. S. C. 242 provides:

> Whoever, under color of law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation, of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U. S. C. 371 provides in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . .

The Fourteenth Amendment provides in part as follows:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

On January 15, 1965, a United States grand jury for the Southern District of Mississippi, Eastern Division, returned two indictments (R. 1-2, 11-16) charging eighteen persons with a violation of 18 U. S. C. 241, and 18 U. S. C. 242, and 18 U. S. C. 371. The indictment bearing Criminal number 5215 in the District Court, now number 59 in this Court, returned under 18 U. S. C. 241, charged all the Appellees with having conspired together with each other and other persons unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney, and Andrew Goodman, each a citizen of the United States, in the free exercise and en-

joyment of the rights and privileges secured to them by the Fourteenth Amendment to the Constitution of the United States, not to be deprived of life or liberty without due process of law by persons acting under color of laws of Mississippi. The indictment further charges the plan and purpose of the conspiracy in that Cecil Ray Price while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in his custody in the Neshoba County jail located in Philadelphia, Mississippi, would release them from custody at such time they would be intercepted by others upon their leaving the area of the Neshoba County jail, and that they would then be threatened, assaulted, shot and killed.

A motion to dismiss the indictment returned under Section 241 was filed on behalf of the Appellees on January 25, 1965, upon the grounds that the indictment did not state facts sufficient to constitute an offense against the United States.

The District Court, by opinion dated February 24, 1965, sustained the motion to dismiss the indictment predicated upon 18 U. S. C. 241; an order was entered dismissing the same on March 2, 1965, holding that the indictment did not state an offense against the laws of the United States. The alleged offense in the indictment was said to have been committed in Neshoba County, Mississippi. The Court held that Section 241 was designed and intended for the protection of federally created rights and not for any right merely guaranteed by the laws of the United States. The District Court held, (R. 4-5) that the statute in question did not make murder a federal crime, that the right of every person not to be deprived of his life or liberty without due process of law was a right that existed prior to the Federal Constitution, and was a right which is protected by State laws. The District Court cited the case of UNITED STATES vs CRUIKSHANK, 92 US. 588; WIL-

LIAMS vs UNITED STATES (5CA) 179 F. 2d 644, (1950), and UNITED STATES vs WILLIAMS 341 US. 70, 71 S. Ct. 581. The District Court held that the Fourteenth Amendment prohibits the State from depriving any person of life, liberty or property without due process of law, but that such added nothing to the rights of one citizen as against another, and that the defendants were not charged with a violation of any right which was conferred upon either of the victims by a federal law, and that it was of no consequence in law that some of the defendants were officials and some of them were merely private citizens as to the charge and indictment returned under Section 241. The District Court also held that Section 241 was the sole and exclusive exponent of the offense set forth in the indictment and as such the indictment did not charge the defendants with any offense against the laws of the United States, but that the indictment surely stated a heinous crime against the State of Mississippi.

The second indictment being Criminal Case number 5216, now number 60 in this Court, charged all the defendants with the violation of 18 U. S. C. 371 and 18 U. S. C. 242.

Count one of that indictment charged all of the defendants with a conspiracy to commit an offense against the United States in violation of 18 U. S. C. 371, charging further that the defendants conspired to wilfully subject Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each an inhabitant of the State of Mississippi, to the deprivation of their rights, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of law of the State of Mississippi, and stated further the release from custody, the interception, the threats, assaults, shooting and kill-

ing. The indictment further states the overt acts necessary to support the charge. The District Court upheld count one of the indictment, which charged all of the defendants with general conspiracy to commit an offense against the United States.

The 2, 3, and 4 count of the indictment in number 60 charged substantive violations of Section 242, as against all of the defendants, the three officers of the law as well as the private citizens. Each count is the same as to the charges of acts under color of law in violation of the aforesaid Section 242, including charges of wilful assault, shooting and killing an inhabitant of the State of Mississippi, then and there in the custody of the sheriff, with the intent of punishing the victims without due process of law, and with the intent to deprive them of their life and liberty and the right and privilege to be secure in his person while in the custody of the State of Mississippi, and the right and privilege to be immune from summary punishment without due process, and the right to be tried by due process of law of an alleged offense. The District Court sustained motions to dismiss counts 2, 3, and 4 as to all of the private individuals and denied similar motions in respect to the three defendants who are law enforcement officers. (R. 23-26). The indictment in number 60, (R. 11-16) made no reference to 18 U. S. C. 2, the aiding and abetting statute, and the District Court had no opportunity to pass on any question under 18 U. S. C. 2.

ARGUMENT

INTRODUCTION:

It is contended by the Appellees that Section 241 extends to federally created rights, or rights arising by virtue of the relationship of the victim and the Federal Government and further that Section 241, since its authority and power stems from the Constitution, does not include a guaranty of protection against assault and battery and murder, and neither does it extend to conspiracy to commit an assault and battery and murder.

Every power of the Federal Government and the exercise of that power is circumscribed, granted or limited by the Constitution of the United States. The Federal Courts have only such powers as are conferred by the valid acts of congress. No common law criminal jurisdiction exists, and all criminal statutes should be strictly construed. PRUSSIAN v. UNITED STATES, 282, US. 675, 677, 75 L. ed. 610, 612, (1931). And doubt must be resolved against broadening the scope of a criminal statutes. UNITED STATES v. ADIELIZZIO 77 F. 2d 841, 844 (7th Cir. 1935).

I.

SECTION 241 OF THE CRIMINAL CODE DOES NOT REACH INTERFERENCES WITH THE EXERCISE OF NATURAL RIGHTS OF THE CITIZEN OR INHABITANT, AND SUCH INTERFERENCES ARE NOT ENCOMPASSED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is readily admitted that it is the duty of every republican government to protect the equality of the rights of its citizens, yet the right of punishment of one citizen for injure or harm to another arising from natural rights of the latter, was rightfully assumed by the respective States, and such duty should remain with the States.

The obligation rests upon the United States to see that the States do not deny the right to such protection, and this the Fourteenth Amendment guarantees, but no more. "No state shall make or enforce any law, which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law." This Constitutional guaranty protects the citizen from encroachment by the States. The congress has power to enforce, by appropriate legislation, the aforesaid provisions of the Fourteenth Amendment, and it is clear that the congress did so by enacting 18 U. S. C. 242.

The right to be free of assault and battery as between one citizen and another or an assault and battery and murder by one citizen against another is not protected by the Fourteenth Amendment of the Constitution and is not reached by Section 241 of Title 18 U. S. C.; and such is true as to a charge of conspiracy to commit false imprisonment, assault and murder.

It is therefore respectfully contended that the Congress had in mind, in passing Section 241, the Federal rights which pertain to citizens of the United States and not the general guaranty against abridgement by the States extended to all persons by the clause of the Fourteenth Amendment. This position is supported by the case of UNITED STATES vs. CLASSIC, 313 US. 299, 61 S. Ct. 1031, 85 L. ed. 1368. In that case the right of a citizen to vote for a congressman was involved. Ex PARTE YARBROUGH, 110 US. 651, 4 S. Ct. 152, 28 L. ed. 274, also involved the right of a citizen to vote and in that case it appears that the Fifteenth Amendment, and not the Fourteenth Amendment was rested upon. GUINN vs. UNITED STATES, 238 US. 347, 59 L. ed. 1340 (1915), UNITED STATES vs. MOSLEY, 238 US.

383, 59 L. ed. 1355 (1915), UNITED STATES vs. SAYLOR, 322 US. 385, 88 L. ed. 1341 (1944); the right to establish a claim under the Homestead Acts, this being a right "wholly" dependent upon an Act of Congress. UNITED STATES vs. WADDELL, 112, US. 76, 28 L. ed. 673 (1884); the right of citizens in custody of a United States marshall to be free from assault, LOGAN vs. UNITED STATES, 144 US. 263, 36 L. ed. 429 (1892), and the right to inform on violations of federal laws, In Re QUARLES, 158 US. 532, 39 L. ed. 1080 (1895), MOTES vs. UNITED STATES, 178 US. 458, 44 L. ed. 1150 (1900). The rights under the due process clause of the Fourteenth Amendment are secured to everyone, not just to citizens. Section 241 does not reach the conduct described in the indictment in number 59.

Section 241 is different from Section 242, even though both sections have to do with federally secured rights, Section 242 creates a misdemeanor offense, done under color of law against an inhabitant on account of color or race, and punishes criminal acts, and not a conspiracy to commit acts, while on the other hand Section 241 creates a felony offense and punishes persons who conspire to commit an act, and makes no reference to color of law; it also adds an additional separate and independent crime of going on the highway or premises of another with the bad intent to hinder the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States.

The words "under color of law" placed in the indictment in case number 59 do not aid in the determination of whether or not the Fourteenth Amendment is an exponent of Section 241. By the language "under color of law" a misdemeanor created by Section 242 cannot be converted into a felony under Section 241. All appellees are under indictment returned under 18 U. S. C. 371, and the three officers remain under valid indict-

ment under Section 242. It is crystal clear that Section 242 encompasses the guaranty of the Fourteenth Amendment, and that Section 371 makes persons vulnerable for prosecution who have conspired to violate Section 242. Then without overlapping Section 241 encompasses rights arising by virtue of the relationship of the victim and the Federal government. Whether conviction be valid under Section 241 depends upon the inclusiveness of that Section, and the same cannot be expanded merely by the fact that the draftsman may have used the words "under color of law". It would be untenable to contend that both Section 242 and Section 241 apply or cover the same rights. The Appellants contend that the Appellees should be punished under the general conspiracy statute 18 U. S. C. 371, on substantive charge under Section 242 and under Section 241, a felony charge. It would clearly appear then, that to charge the Appellees under Section 241 with conspiracy and also a charge under Section 371 of conspiracy to violate a law of the United States, and then a substantive charge under Section 242 would merely be an effort to expand the punishment. A construction, however, of Section 241 to include that said section was established to protect the rights of individuals that arise from the relationship of the indivdual and the Federal government, would prevent overlapping of the statutes and bear on the intent of the congress. If the exponent of the indictment under Section 241 had to do with the relationship arising between the citizen and the Federal government, such as the right to vote for a congressman, or some such federally created right, in such an event, a valid offense against the United States would have been charged. The right to vote for a congressman in a general election is a federally secured right. Ex PARTE YARBROUGH, supra, and QUINN vs. UNITED STATES, supra.

It should appear untenable to contend that the Federal Constitution secures to a citizen of the United States the

right to be free of assault and murder, oppression, or interference by other citizens; such rights are natural rights. The protection of such natural rights rests with the respective States.

The Fourteenth Amendment did not grant or create federal citizenship rights; it broadened the protection against encroachment by the State, but it did not add to or increase any right of one citizen against another, and the powers of the national government are limited to the enforcement of that guaranty. UNITED STATES vs. CRUIKSHANK, 92 US. 588 (1875) 23 L. ed. 542.

Perhaps it would be conceded that it is true that in cases such as Ex PARTE YARBROUGH, 110 US. 651 (1834); LOGAN vs. UNITED STATES, 144 US. 263 (1892); and in RE QUARLES, 158 US. 532 (1895), where the right violated involved the relationship of the individual with the Federal Government, the Court very often emphasized that relationship. And in such cases the defendants were private individuals who had not acted under color of State Law and there was no attempt to demonstrate the relationship of the conduct of the defendants to the Fourteenth Amendment rights, and it was accordingly important to emphasize the peculiarly Federal nature of the right in order to sustain the prosecutions. Since it is now contended by the Appellant, with which we agree, that it matters not whether the defendants are officers or private individuals as to Section 241, then why shouldn't cases like Yarbrough, Logan and Quarles, supra, be considered judicial determinations that Section 241 could be used only in cases involving these peculiarly Federal rights. Certainly such cases can be taken to indicate that there was no State Action of any sort or attempt to demonstrate a relationship between the conduct charged and acts under color of law, and certainly a Federal-type right is important in order to sustain prosecution of a private individual. Accord-

ingly we assume it is now said—so goes the argument—that the Fourteenth Amendment creates a positive Federal-type right without regard to acts or charges under color of law; such a position, however, is not plausible, neither is it consistent with the language of the Amendment. The indictment under Section 241, number 59 in this Court, states that the conspiracy was to injure, oppress, threaten and intimidate the named victims in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment—not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi. As already stated, for the purpose of the scope of 241 the indictment might as well have ended without the words "under color of the laws of Mississippi". So the charge in the indictment then is that the injury was to the free exercise and enjoyment of the right secured by the Amendment. In other words, the right and privilege secured by the Fourteenth Amendment as charged in the indictment was not to be deprived of life or liberty without due process of law, or the exercise of that right, but that which was charged to have occurred was an injury and intimidation of the exercise of that right to life and liberty, a natural right. The Amendment did not guarantee life or liberty from injury, neither did it secure the citizen or inhabitant the exercise of the freedom of life without assault or injury. The Amendment guaranteed that there would be no encroachment by the State on life or liberty without due process of law, and accordingly the charge made in the indictment deals with nothing guaranteed or secured by the Amendment, and therefore the Acts charged by the indictment could not have interfered with the due process secured by the Amendment. We take it that only "state action" can deprive a person of a Fourteenth Amendment right. The deprivation of a right can obviously be effected only by

the entity which is under an obligation to fulfill the right. Where a State operates a biracial school system, students may be deprived of their right to attend school without regard to color. No private person could deprive a child of the right to attend school without regard to race since private persons have no duty to accord a non-discriminatory education. One can be deprived of a right only by the person or entity which is under the duty to fulfill the right. The Appellant, upon conceding the above, may contend that the injury was to the free exercise and enjoyment of the right secured to him by the laws of the United States and/or the Constitution. We need to remember that the indictment in number 59 deals—it is said, only with Fourteenth Amendment rights. To go then further with the contention that the charge in the indictment is not for deprivation of Fourteenth Amendment rights, but is only a charge of interfering with the free exercise of such rights guaranteed by the Amendment is to simply attempt to change the nature of the guaranty of the Amendment. It cannot be said with sound reasoning that a person has a natural right to life and when that natural right is interfered with that by virtue of the fact that the Fourteenth Amendment guaranteed it to him without encroachment by the State such an occurrence, such as a false imprisonment, assault and murder, gives rise to an interference with that Federal-type right that should extend the strong arm of the Federal government to the States for punishment of such offenses without regard to State action. The line must be drawn, else there can be no criterion or rule of law permitting a balance of law enforcement powers.

In the case of UNITED STATES vs. BAILES, 120 F. Supp. 614 (S. D. W. Va., 1954) an indictment was sought under 18 U. S. C. 241 charging defendants with conspiring to unlawfully injure, oppress, threaten, and in-

timidate 58 persons in their exercise of the right to refrain from forming, joining or assisting labor organizations. The District Court dismissed the indictment on two grounds, one that the right of employees to organize or refrain from organizing is not a right granted by or dependent on the Constitution or law of the United States since the right existed before the Consitution was adopted, and hence the Court concluded under the doctrine laid down in the case of UNITED STATES vs. WILLIAMS, 341 US. 70 (1951), that 18 U. S. C. 241 had no application; further the court held that the defendants were all charged in their individual capacities and that the provisions of the Labor Management Relations Act, the violation of which was the basis for the indictment, were not intended to protect employees against private persons. The indictment in number 59 in this Court deals only with rights that were in existence before the adoption of the Constitution, the right to life and liberty and the right of freedom from interference with life and liberty, all being natural rights. Such are the attributes of citizenship under a free government. It derives its source, to use the language of Chief Justice Marshall, in GIBBONS v. OGDEN, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." And quoting from UNITED STATES vs. CRUIKSHANK, supra, "It is found whereever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to congress, it remains, according to the ruling in GIBBONS v. OGDEN, 9 Wheat, 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of congress as came within the general scope of the authority granted to the National Government."

In the Case of United States v. Wheeler, 254 U. S. 281, (1920), the right there involved was the right to move from place to place, free ingress thereto and egress therefrom. The District Court in 254 Fed. 611 (1918), had held that Section 19 had the same meaning when it was enacted as Section 6 of the Act of May 31, 1870, and that it was intended to protect the political rights of citizens of the United States in the several States and not their civil rights as mere persons, residents or inhabitants. See also Baldwin v. Franks, 120 U. S. 678. Affirming the Wheeler case on appeal, the Court stated that Crandall v. Nevada, 6 Wall. 35, on which the government had relied, was inapplicable.

In United States v. Bathgate, et al, 246 U. S. 220, the Court would not extend the ruling in the MOSLEY, or YARBROUGH or WADDELL or LOGAN cases to a conspiracy to bribe voters at a general election within a State where presidential electors were chosen. "The real point involved is whether Section 19 (241) denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen. Our concern is not with the power of Congress but with the proper interpretation of action taken by it. This must be ascertained in view of the settled rule that 'there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute' (United States v. Lasher, 134 U. S. 624, 628)".

In Hodges v. United States, 203 U. S. 1 (1906), the question involved was whether a conspiracy to forcibly prevent citizens from disposing of their labor by contract upon such terms as they deemed desirable, infringed a right or privilege dependent upon the Constitution

of the United States, and the question was answered in the negative.

In the case of Walker v. United States, 93 F. 2d 383 (C. C. A. 8), an indictment under Section 19 (19 U. S. C.) and Section 51, charging a conspiracy to injure citizens in their right to vote for presidential electors, the court held that such an indictment charged no federal offense since presidential electors are State officers, and not Federal officers. Ex Parte Yarbrough, supra, was distinguished, and in doing so the Court held that the right to vote for presidential electors depends directly and exclusively on state legislation.

A. LEGISLATIVE HISTORY — REFERENCE TO REMARKS OF SENATOR POOL.

It is contended on page 10 of the Appellant's brief that the rights guaranteed by due process clause of the Fourteenth Amendment are rights and privileges secured by the Constitution within the meaning of Section 241, and that same arises from the language of the Statute, its context and its Legislative history, and then on page 13 of the Appellant's brief, making reference to history in the judicial field, it is stated that such does not come from a venerable tradition initiated by judges who were immediately familiar with the enactment of the provision, and then to support such contention, remarks of Senator Pool of North Carolina are cited and reported fully in the Appendix of the brief. We respectfully call the Court's attention to page 39, being a part of Senator Pool's remarks, noting that on line 5 thereof, the Senator speaks of "in the exercise of their rights." On the same page in the same paragraph we note the following: "the Fifteenth Amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on ac-

count of race, color, or previous condition of servitude. It speaks of 'the right of citizens to vote'." Senator Pool goes on to state that voting is a right and that the same shall not be denied or abridged by the United States or by any State. It is contended by Senator Pool that the Legislation then about to be enacted should apply to individuals, and that individuals should be reached by virtue of the word "deny" in that—so goes the argument—States by acts of omission may practically deny the rights secured by the Constitution, and that the Legislation of congress must be to supplement acts of omission on the part of the States. It is important to note that throughout Senator Pool's speech he referred to the right to vote and such rights as arise from the relationship of the victim with the Federal Government, and this is the import given to the word "citizens". Senator Pool then refers on page 40 and 41 to the Fourteenth Amendment, stating that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deny to any person within its jurisdiction equal protection of the laws, and there the emphasis was placed on the word "deny", but still the Senator refers to rights of citizens and there stated that "it shall not deny by acts of omission, by failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights." He there contends that if a State omits to carry into effect the provisions of the civil rights act, to secure the citizens in their rights, that the provisions of the fifth section of the Fourteenth Amendment will be called into operation, which is "that congress shall enforce by appropriate Legislation the provisions of this article." The emphasis placed on the words "citizens and their rights" simply means that there is something more intended in the relationship of the victim regardless of whether he be a citizen or an inhabitant in order to form a basis or give rise to an extension of the arm

of the national government. Certainly this has been the basis in regard to school desegregation decisions, the interstate commerce cases, and with the same principle implanted into the 1964 civil rights legislation having to do with whether or not an establishment comes within interstate commerce. On page 43 Senator Pool advocates in his speech, for the first time, that something should be done about conspiracies organized for the express purpose of contravening the right conferred by the Fifteenth Amendment, and he again, in our opinion, defined rights arising from the relationship of the victim and the federal government. Then in paragraph 2 of Senator Pool's remarks on page 43, he speaks further of those who would take upon themselves to compel his fellow citizen to vote in a particular way and then he said, as concerns such compulsions in regard to voting, that there should be legislation "against that". Then on page 46 after having continuously talked about the right of suffrage and oppression of citizens in regard to voting which evidently was the intent and purpose of Senator Pool's speech, he states "there is another feature of my amendment which I deem of some importance. It is this: 'that if in the act of violating any provision in either of the two preceding sections any other felony, crime or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States'." Then Senator Pool went on to state that he felt that a most effective mode of preventing intimidation and attempts of coercion would be in making "any offense commited in the effort to violate them indictable before the courts of the United States." **Senator Pool's thinking in this regard was not extended by the congress and in the mind of the writer such would be substantial proof of Legislative intent not to extend Section 241 to the relationship of one citizen to another citizen.** Accordingly the entire import of Senator Pool's speech is that the strong arm of the national govern-

ment should extend to individuals, true, who seek to conspire to intimidate and threaten citizens relative to an exercise of their rights arising because of and from the relationship of the victim with the United States government, rather than any and all offenses committed by private citizens or inhabitants against another private citizen or inhabitants.

To repeat, the usage of the word "citizens" in the development of the principle involved, forming a basis for the extension of federal power, carries with it the import that some basic criterion must be present whether it has to do with the right of a citizen to vote, or some other relationship arising between the victim and the United States government. It is untenable to say that the power of the federal government to prosecute should extend to all offenses on the basis of the syllogistic reasoning that by virtue of our republican form of government all natural rights arise therefore from the inhabitant's relationship with his government, and that whatever the relationship may be that the federal power should be extended for the protection thereof. The argument is likewise untenable when restricted to conspiracies simply on the basis that the statute refers to conspiracies without regard as to whether the object of that conspiracy comes within the qualifying prerequisite necessary for the extension of the federal power against the offender for his wrong doing. It has been conceded by the Appellant that only three of the Appellees charged were officers and that all others were private individuals; surely it cannot be contended with any reasonableness that by virtue of the fact that the private citizens were charged with acting under color of law under 242 by the aid of the aiding and abetting statute, that the aiding and abetting statute makes them de jure or de facto officers capable of a violation of a substantive offense under Section 242, and that likewise they can be reached by 241

solely by virtue of this new acquired status under the aiding and abetting statute. Such a proposition is not reasonable but it does appear to have arisen in the theory of the Appelant's presentation. The indictment used the words "under color of law". This alone would seem to be a concession on the part of the Appellant that something must provide the basic criterion for the extension of federal power. It may also be an acknowledgment of the weakness of the position that conspiracy punished as a misdemeanor under 371 can be extended to a felony by having the alleged offenders charged under 18 U. S. C. 241. From such language it does appear that the draftsman of the indictment under Section 241 realized the necessity of having something more to tie the offense to than that of a conspiracy to commit false imprisonment and murder, and to this end he uses the words "under color of law" and seeks by such terminology to be better able to have as its ultimate exponent the prohibitions and protections afforded by the Fourteenth Amendment. In the case at bar, we are not dealing with a pattern or custom concerning which a failure of due process is claimed, but are simply dealing with an alleged conspiracy to commit an assault and battery and murder, claimed to be in violation of due process of law.

It would be elementary to say that under the current decisions of this Court that there must be present some reason for the extension of federal power, such as in an intervention case where it is alleged that due process has been denied by the defendants under a State law, ordinance or custom, which is in no wise the case at bar, and such should not be presumed in order to extend the Federal powers of our great government under Section 241. The balance of power must be necessarily maintained, and this we feel is in line with the principle laid down by this Honorable Court in UNITED STATES v. WILLIAMS 341 US. 70; 71 S. Ct. 581, and that such is the real issue here involved.

II

THE DISTRICT COURT IN CASE NUMBER 60 DEALT WITH AN INTERPRETATION OF THE INDICTMENT, OR THE SUFFICIENCY OF THE ALLEGATIONS THEREOF AND THERE IS NO JURISDICTION ON DIRECT APPEAL.

In the case of BROWN v. UNITED STATES, (6 CA) 204 F. 2d 247, Brown was convicted of violating 18 U. S. C. 371, and charged with violation of 18 U. S. C. 242, which was dismissed because he was a private citizen and not an officer acting under color of law as in COMMONWEALTH OF VIRGINIA v. RIVES, 100 US. 313; UNITED STATES v. CRUIKSHANKS, 92 US. 542; SCREWS v. UNITED STATES, 325 US. 110, 65 S. Ct. 1039, wherein such action was held to be correct. However, the fact that a private individual may be legally incapable of violating 242 does not render him immune from a charge of violating 18 U. S. C. 371, as in UNITED STATES v. THIERWEILER D. C., 52 F. Supp. 4, and as in CALLAN v WILSON, 127, US. 540; 8 S. Ct. 1301, a person may be guilty of conspiring, although incapable of committing the objective offense.

In case number 60 the substantive charge against the private individuals under Section 242 should have been dismissed because, as stated by the District Court (R. 19), it was not charged as an ultimate fact that the private individual, or either of them, did anything as an official under color of any law, statute, ordinance, regulation, or custom as 242 provides and as a violation thereof would require. "The indictment states that three of the defendants were acting as officers in all that they did, but it does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'." (R 20).

The United States now contends that the Appellees who are private individuals should now be reached by 18 U. S. C. 2, the aiding and abetting statute. Nothing was said in the indictment concerning this statute, and no words were used in the indictment to bring private individuals under section 242; hence the decision of the lower court was based upon, at least in part, the inadequacy of the indictment as such to charge the alleged offense, or to make reference to 18 U. S. C. 2, and such being the case there is no jurisdiction on direct appeal. UNITED STATES v. SWIFT & COMPANY, 318 US. 442, 87 L. ed. 89, and of course the Government's appeal must be based upon the authority given by the statute invoked as grounds for the appeal. UNITED STATES v. JANITCS (CA3) 161 F. 2d 19. Further, 18 U. S. C. 2 having not been presented as a part of the case before the District Court, the proposition contended for by the Government should not be heard by the Court on appeal. UNITED STATES v. GEORGE, 228 US. 14, 57 L. ed. 712, 33 SCR 412.

We, therefore respectfully submit that the question of whether or not the individual citizens could be prosecuted under Section 242 by way of the aiding and abetting statute was also dependent upon the wording of the indictment, and therefore in any event there was no construction of the Statute by the District Court in case number 60 and this honorable Court should accordingly not take jurisdiction of the same.

CONCLUSION

For the foregoing reasons the judgment of the District Court in dismissing the indictment in number 59 should be affirmed. As to case number 60, the decision of the District Court being based upon, at least in part, a mere interpretation of the indictment as to the necessary allegation of facts, and references to statutes intended as exponents, this Honorable Court does not have jurisdiction to review case number 60.

Respectfully submitted

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October 1965

CERTIFICATE OF SERVICE

This is to certify that on the ____day of October 1965, I served five copies of the foregoing Brief for the Appellees upon Honorable Thurgood Marshall, Solicitor General, Department of Justice, Washington 25, D. C., by mailing five copies of said Brief by first class air mail, postage prepaid, to him at the aforesaid business address pursuant to the requirements of Rule 33, Rules of the Supreme Court of the United States.

H. C. Mike Watkins, one of
Counsel for the Appellees.

SUPREME COURT OF THE UNITED STATES

Nos. 59 AND 60.—OCTOBER TERM, 1965.

United States, Appellant, *v.* Cecil Ray Price et al. } On Appeals From the United States District Court for the Southern District of Mississippi.

[March 28, 1966.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

These are direct appeals from the dismissal in part of two indictments returned by the United States Grand Jury for the Southern District of Mississippi. The indictments allege assaults by the accused persons upon the rights of the asserted victims to due process of law under the Fourteenth Amendment. The indictment in No. 59 charges 18 persons [1] with violations of 18 U. S. C. § 241 (1964 ed.). In No. 60, the same 18 persons are charged with offenses based upon 18 U. S. C. § 242 (1964 ed.). These are among the so-called civil rights statutes which have come to us from Reconstruction days, the period in our history which also produced the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.

The sole question presented in these appeals is whether the specified statutes make criminal the conduct for which the individuals were indicted. It is an issue of construction, not of constitutional power. We have no doubt of "the power of Congress to enforce by appro-

[1] One of the defendants charged in the two indictments, James E. Jordan, is not a party to the present appeal. His case was transferred under Rule 20, Fed. Rules Crim. Proc., to the United States District Court for the Middle District of Georgia.

priate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment." *United States* v. *Williams*, 341 U. S. 70, 72.[2]

The events upon which the charges are based, as alleged in the indictments, are as follows: On June 21, 1964, Cecil Ray Price, the Deputy Sheriff of Neshoba County, Mississippi, detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County jail located in Philadelphia, Mississippi. He released them in the dark of that night. He then proceeded by automobile on Highway 19 to intercept his erstwhile wards. He removed the three men from their automobile, placed them in an official automobile of the Neshoba County Sheriff's office, and transported them to a place on an unpaved road.

These acts, it is alleged, were part of a plan and conspiracy whereby the three men were intercepted by the 18 defendants, including Deputy Sheriff Price, Sheriff Rainey and Patrolman Willis of the Philadelphia, Mississippi, Police Department. The purpose and intent of the release from custody and the interception, according to the charge, were to "punish" the three men. The defendants, it is alleged, "did wilfully assault, shoot and

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[2] Cf. Mr. Justice Holmes in *United States* v. *Mosley*, 238 U. S. 383, 386 (a federal voting rights case under an earlier version of § 241): "It is not open to question that this statute is constitutional . . . ." The source of congressional power in this case is, of course, § 5 of the Fourteenth Amendment, which reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There are three "Williams" cases arising from the same events. The first, with no bearing on the present appeal is *United States* v. *Williams*, 341 U. S. 58, involving a prosecution for perjury. The second, *United States* v. *Williams*, 341 U. S. 70, was a prosecution for violation of § 241; it will be referred to hereinafter as *Williams* I. The third, *Williams* v. *United States*, 341 U. S. 97, was a prosecution for violation of § 242; it will be referred to as *Williams* II.

kill" each of the three. And, the charge continues, the bodies of the three victims were transported by one of the defendants from the rendezvous on the unpaved road to the vicinity of the construction site of an earthen dam approximately five miles southwest of Philadelphia, Mississippi.

These are federal and not state indictments. They do not charge as crimes the alleged assaults or murders. The indictments are framed to fit the stated federal statutes, and the question before us is whether the attempt of the draftsman for the Grand Jury in Mississippi has been successful: whether the indictments charge offenses against the various defendants which may be prosecuted under the designated federal statutes.

We shall deal first with the indictment in No. 60, based on § 242 of the Criminal Code, and then with the indictment in No. 59, under § 241. We do this for ease of exposition and because § 242 was enacted by the Congress about four years prior to § 241.[3] Section 242 was enacted in 1866; § 241 in 1870.

I. No. 60.

Section 242 defines a misdemeanor, punishable by fine of not more than $1,000 or imprisonment for not more than one year, or both. So far as here significant, it provides punishment for "Whoever, under color of law, statute, ordinance, regulation, or custom wilfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States . . . ."

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[3] In the interests of clarity, we shall use the present designation of the statutes throughout this discussion. Reference is made to the Appendix to Mr. Justice Frankfurter's opinion in *Williams* I, 341 U. S., at 83, which contains a table showing major changes in the statutes through the years.

The indictment in No. 60 contains four counts, each of which names as defendants the three officials and 15 nonofficial persons. The First Count charges, on the basis of allegations substantially as set forth above, that all of the defendants conspired "to wilfully subject" Schwerner, Chaney and Goodman "to the deprivation of their right, privilege and immunity secured and protected by the Fourteenth Amendment of the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi." This is said to constitute a conspiracy to violate § 242, and therefore an offense under 18 U. S. C. § 371. The latter section, the general conspiracy statute, makes it a crime to conspire to commit any offense against the United States. The penalty for violation is the same as for direct violation of § 242—that is, it would be a misdemeanor.[4]

On a motion to dismiss, the District Court sustained this First Count as to all defendants. As to the sheriff, deputy sheriff and patrolman, the court recognized that each was clearly alleged to have been acting "under color of law" as required by § 242.[5] As to the private persons, the District Court held that "[I]t is immaterial to the conspiracy that these private individuals were not acting under color of law" because the count charges that they were conspiring with persons who were so acting. See *United States* v. *Rabinowich*, 238 U. S. 78, 87.

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[4] "If . . . the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U. S. C. § 371 (1964 ed.).

[5] This is settled by our decisions in *Screws* v. *United States*, 325 U. S. 91, 107–113, and *Williams* II, 341 U. S., at 99–100.

The court necessarily was satisfied that the indictment, in alleging the arrest, detention, release, interception and killing of Schwerner, Chaney and Goodman, adequately stated as the purpose of the conspiracy, a violation of § 242, and that this section could be violated by "wilfully subject[ing] the victims to the deprivation of their right, privilege and immunity" under the Due Process Clause of the Fourteenth Amendment.

No appeal was taken by the defendants from the decision of the trial court with respect to the First Count and it is not before us for adjudication.

The Second, Third and Fourth Counts of the indictment in No. 60 charge all of the defendants, not with conspiracy, but with substantive violations of § 242. Each of these counts charges that the defendants, acting "under color of the laws of the State of Mississippi," "did wilfully assault, shoot and kill" Schwerner, Chaney and Goodman, respectively, "for the purpose and with the intent" of punishing each of the three and that the defendants "did thereby wilfully deprive" each "of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States"—namely, due process of law.

The District Court held these counts of the indictment valid as to the sheriff, deputy sheriff and patrolman. But it dismissed them as against the nonofficial defendants because the counts do not charge that the latter were "officers in fact, or de facto in anything allegedly done by them 'under color of law.'"

We note that by sustaining these counts against the three officers, the court again necessarily concluded that an offense under § 242 is properly stated by allegations of willful deprivation, under color of law, of life and liberty without due process of law. We agree. No other result would be permissible under the decisions of

this Court. *Screws* v. *United States*, 325 U. S. 91; *Williams* II.[6]

But we cannot agree that the Second, Third or Fourth Counts may be dismissed as against the nonofficial defendants. Section 242 applies only where a person indicted has acted "under color" of law. Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a wilfull participant in joint activity with the State or its agents.[7]

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[6] ". . . where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court." *Williams* II, 341 U. S., at 101.

[7] "Under color" of law means the same thing in § 242 that it does in the civil counterpart to § 242, 42 U. S. C. § 1983. *Monroe* v. *Pape*, 365 U. S. 167, 185 (majority opinion), 212 (Frankfurter, J., dissenting). In cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment. See, *e. g.*, *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461; *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C. A. 4th Cir.), cert. denied, 376 U. S. 938; *Smith* v. *Holiday Inns*, 336 F. 2d 630 (C. A. 6th Cir.); *Hampton* v. *City of Jacksonville*, 304 F. 2d 320 (C. A. 5th Cir.), cert. denied, 371 U. S. 911; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C. A. 5th Cir.); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C. A. 4th Cir.), cert. denied, 326 U. S. 721.

The contrary view in a § 242 context was expressed by the dissenters in *Screws*, 325 U. S., at 147–149, and was rejected then, later in *Williams* II, and finally—in a § 1983 case—in *Monroe* v. *Pape*, *supra*. Cf. *Peterson* v. *City of Greenville*, 373 U. S. 244, 250 (concurring opinion of HARLAN, J.). Recent decisions of this Court which have given form to the "state action" doctrine make it clear that the indictments in this case allege conduct on the part of the "private" defendants which constitutes "state action," and hence

In the present case, according to the indictment, the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in wilfull concert with state officers and hence under color of law.

Appellees urge that the decision of the District Court was based upon a construction of the indictment to the effect that it did not charge the private individuals with acting "under color" of law. Consequently, they urge us to affirm in No. 60. In any event, they submit, since the trial court's decision was based on the inadequacy of the indictment and not on construction of the statute,

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action "under color" of law within § 242. In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, we held that there is "state action" whenever the "State has so far insinuated itself into a position of interdependence [with the otherwise 'private' person whose conduct is said to violate the Fourteenth Amendment] . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U. S., at 725. Cf. *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230; *Evans* v. *Newton*, — U. S. —; *Peterson* v. *City of Greenville*, 373 U. S. 244; *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; *Griffin* v. *Maryland*, 378 U. S. 130; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401; *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461; *Williams* II, 341 U. S., at 99–100.

we have no jurisdiction to review it on direct appeal. *United States* v. *Swift & Co.*, 318 U. S. 442. We do not agree. Each count of the indictment specifically alleges that all of the defendants were acting "under color of the laws of the State of Mississippi." The fault lies not in the indictment, but in the District Court's view that the statute requires that each offender be an official or that he act in an official capacity. We have jurisdiction to consider this statutory question on direct appeal and, as we have shown, the trial court's determination of it is in error. Since each of the private individuals is indictable as a principal acting under color of law, we need not consider whether he might be held to answer as an "aider or abettor" under 18 U. S. C. § 2 (1964 ed.), despite omission to include such a charge in the indictment.

Accordingly, we reverse the dismissal of the Second, Third and Fourth Counts of the indictment in No. 60 and remand for trial.

II. No. 59.

No. 59 charges each of the 18 defendants with a felony—a violation of § 241. This indictment is in one count. It charges that the defendants "conspired together . . . to injure, oppress, threaten and intimidate" Schwerner, Chaney and Goodman "in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty wtihout due process of law by persons acting under color of the laws of Misaissippi." The indictment alleges that it was the purpose of the conspiracy that Deputy Sheriff Price would release Schwerner, Chaney and Goodman from custody in the Neshoba County jail at such time that Price and the other 17 defendants "could and would intercept" them "and threaten, assault and kill them." The penalty under § 241 is a fine of not more than $5,000, or imprisonment for not more than 10 years, or both.

Section 241 is a conspiracy statute. It reads as follows:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

The District Court dismissed the indictment as to all defendants. In effect, although § 241 includes "rights or privileges secured by the Constitution or laws of the United States" without qualification or limitation, the Court held that it does not include rights protected by the Fourteenth Amendment.

It will be recalled that in No. 60 the District Court held that § 242 included the denial of Fourteenth Amendment rights—the same right to due process involved in the indictment under § 241. Both include rights or privileges secured by the Constitution or laws of the United States. Neither is qualified or limited. Each includes, presumably, *all* of the Constitution and laws of the United States. To the reader of the two sections, versed only in the English language, it may seem bewildering that the two sections could be so differently read.

But the District Court purported to read the statutes with the gloss of *Williams* I. In that case, the only case in which this Court has squarely confronted the point at issue, the Court did in fact sustain dismissal of an indictment under § 241. But it did not, as the District Court incorrectly assumed, hold that § 241 is inapplicable to Fourteenth Amendment rights. The

Court divided equally on the issue. Four Justices, in an opinion by Mr. Justice Frankfurter, were of the view that § 241 "only covers conduct which interferes with rights arising from the substantive powers of the Federal Government"—rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." 341 U. S., at 73, 77. Four other Justices, in an opinion by MR. JUSTICE DOUGLAS, found no support for Mr. Justice Frankfurter's view in the language of the section, its legislative history, or its judicial interpretation up to that time. They read the statute as plainly covering conspiracies to injure others in the exercise of Fourteenth Amendment rights. They could see no obstacle to using it to punish deprivations of such rights. Dismissal of the indictment was affirmed because MR. JUSTICE BLACK voted with those who joined Mr. Justice Frankfurter. He did so, however, for an entirely different reason—that the prosecution was barred by *res judicata*—and he expressed no view on the issue whether "§ 241, as applied, is too vague and uncertain in scope to be consistent with the Fifth Amendment." *Williams* I thus left the proper construction of § 241, as regards its applicability to protect Fourteenth Amendment rights, an open question.

In view of the detailed opinions in *Williams* I, it would be supererogation to track the arguments in all of their intricacy. On the basis of an extensive re-examination of the question, we conclude that the District Court erred; that § 241 must be read as it is written—to reach conspiracies "to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."; that this language includes rights or privileges protected by the Fourteenth Amendment; that whatever the ultimate coverage of the section may be, it extends to conspiracies otherwise within the scope of the section,

participated in by officials alone or in collaboration with private persons; and that the indictment in No. 59 properly charges such a conspiracy in violation of § 241. We shall confine ourselves to a review of the major considerations which induce our conclusion.

1. There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60, *supra*, it alleges that the defendants acted "under color of law" and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law in violation of the Fourteenth Amendment's direct admonition to the States.

The indictment specifically alleges that the sheriff, deputy sheriff and a patrolman participated in the conspiracy; that it was a part of the "plan and purpose of the conspiracy" that Deputy Sheriff Price, "while having [the three victims] . . . in his custody in the Neshoba County Jail . . . would release them from custody at such time that he [and others of the defendants] . . . could and would intercept [the three victims] . . . and threaten, assault, shoot and kill them."

This is an allegation of state action which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment. It is an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.

As we have consistently held "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." *Williams* I, 341 U. S., at 92 (opinion of DOUGLAS, J.). In the present case, the participation by law enforcement officers, as alleged in the indictment, is clearly state action, as we have discussed, and it is therefore with the scope of the Fourteenth Amendment.

2. The argument, however, of Mr. Justice Frankfurter's opinion in *Williams* I, upon which the District Court rests its decision, cuts beneath this. It does not deny that the accused conduct is within the scope of the Fourteenth Amendment, but it contends that in enacting § 241, the Congress intended to include only the rights and privileges conferred on the citizen by reason of the "substantive" powers of the Federal Government—that is, by reason of federal power operating directly upon the citizen and not merely by means of prohibitions of state action. As the opinion below puts it, "the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the Fourteenth Amendment." We do not agree.

The language of § 241 is plain and unlimited. As we have discussed, its language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred by or "flow from" the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution. We agree with the observation of Mr. Justice Holmes in *United States* v. *Mosley*, 238 U. S. 383, 387–388, that

> "the source of this section in the doings of the Ku Klux Klan and the like is obvious and acts of

> violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. . . . [T]his section dealt with Federal rights and with all Federal rights, and protected them in the lump . . . . [It should not be construed so] as to deprive citizens of the United States of the general protection which on its face § 19 [now § 241] most reasonably affords." [8]

We believe, with Mr. Justice Holmes, that the history of the events from which § 241 emerged illuminates the purpose and means of the statute with an unmistakable light. We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language. We are not at liberty to seek ingenious analytical instruments for excluding from its general language the Due Process Clause of the Fourteenth Amendment—particularly since the violent denial of legal process was one of the reasons motivating enactment of the section.[9]

Section 241 was enacted as part of what came to be known as the Enforcement Act of 1870, 16 Stat. 140.[10]

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[8] See also Mr. Justice Rutledge, concurring, in *Screws* v. *United States*, 325 U. S. 91, 120.

[9] It would be strange, indeed, were this Court to revert to a construction of the Forteenth Amendment which would once again narrow its historical purpose—which remains vital and pertinent to today's problems. As is well known, for many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes were concerned. Its sole office was to impede state regulation of railroads or other corporations. Despite subsequent statements to the contrary, nothing in the records of the congressional debates or the Joint Committee on Reconstruction indicate any uncertainty that its objective was the protection of civil rights. See Stampp, The Era of Reconstruction, 136–137 (1965).

[10] The official title is "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes."

The Act was passed on May 31, 1870, a bare two months after ratification of the Fifteenth Amendment. In addition to the new § 241, it included a re-enactment of a provision of the Civil Rights Act of 1866 which is now § 242. The intended breadth of § 241 is emphasized by contrast with the narrowness of § 242 as it then was.[11] Section 242 forbade the deprivation, "under color of law," of "any right secured or protected by this act." The rights protected by the Act were narrow and specific: "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens [and to] be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other." Act of April 9, 1866, 14 Stat. 27. Between 1866 and 1870 there was much agitated criticism in the Congress and in the Nation because of the continued denial of rights to Negroes, sometimes accompanied by violent assaults. In response to the demands for more stringent legislation Congress enacted the Enforcement Act of 1870. Congress had before it and re-enacted § 242 which was explicitly limited as we have described. At the same time, it included § 241 in the Act using broad language to cover not just the rights enumerated in § 242, but all rights and privileges under the Constitution and laws of the United States.

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[11] The substantial difference in coverage of the two sections as they were in the Act of 1870 precludes the argument that § 241 should be narrowly construed to exclude Fourteenth Amendment rights because otherwise it would have been duplicative of § 242 taken in conjunction with the general conspiracy statute, 18 U. S. C. § 371. If, as we hold, § 241 was intended to cover all Fourteenth Amendment rights, it was far broader in 1870 than was § 242. For other reasons for rejecting the duplication argument, see the opinion of MR. JUSTICE DOUGLAS in *Williams* I, 341 U. S., at 88, n. 2.

It was not until the statutory revision of 1874 that the specific enumeration of protected rights was eliminated from § 242. The section was then broadened to include as wide a range of rights as § 241 already did: "any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States." The substantial change thus effected was made with the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance.[12] Section 241 was left essentially unchanged, and neither in the 1874 revision nor in any subsequent re-enactment has there been the slightest indication of a congressional intent to narrow or limit the original broad scope of § 241. It is clear, therefore, that § 241, from original enactment through subsequent codifications, was intended to deal, as Mr. Justice Holmes put it, with conspiracies to interfere with "Federal rights and with all Federal rights." We find no basis whatsoever for a judgment of Solomon which would give to the statute less than its words command.[13]

The purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time.[14] The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent.[15] Congress had taken control of the entire governmental process in former Confederate States.

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[12] See 17 Stat. 74; 17 Stat. 579; S. Misc. Doc. No. 101, 40th Cong., 2d Sess.; H. Misc. Doc. No. 31, 40th Cong., 3d Sess.; S. Misc. Doc. No. 3, 42d Cong., 2d Sess.; 2 Cong. Rec. 646, 648, 1029, 1210, 1461.

[13] The opinion of MR. JUSTICE DOUGLAS in *Williams* I, 341 U. S., at 88, disposes of the argument that the words of § 241 themselves suggest the narrow meaning which the opinion of Mr. Justice Frankfurter found in the section.

[14] See generally, Stampp, The Era of Reconstruction (1965); Nevins, The Emergence of Modern America (1927).

[15] See H. R. Rep. No. 16, 39 Cong., 2d Sess., pp. 12 ff.

It had declared the governments in 10 "unreconstructed" States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.

For a few years "radical" Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls.[16] The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.[17]

Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866, which, as we have described, included § 242 in its originally narrow form. On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified the next month. In February 1869 the Fifteenth Amendment was proposed, and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted.

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[16] Cf. Nevins, *op. cit. supra*, at 351.

[17] See, *id.*, at 352; Morison, Oxford History of the American People, 722–723 (1965).

In this context, it is hardly conceivable that Congress intended § 241 to apply only to a narrow and relatively unimportant category of rights.[18] We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.

This is fully attested by the only statement explanatory of § 241 in the recorded congressional proceedings relative to its enactment. We refer to the speech of Senator Pool of North Carolina who introduced the provisions as an amendment to the Enforcement Act of 1870. The Senator's remarks are printed in full in the Appendix to this opinion.[19] He urged that the section was needed in order to punish invasions of the newly adopted Fourteenth and Fifteenth Amendments to the Constitution. He acknowledged that the States as such were beyond the reach of the punitive process, and that the legislation must therefore operate upon individuals. He made it clear that "It matters not whether these individuals be officers or whether they are acting upon their own responsibility." We find no evidence whatever that Senator Pool intended that § 241 should not cover violations of Fourteenth Amendment rights, or that it should not include state action or actions by state officials.

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[18] See, for example, *United States* v. *Waddell*, 112 U. S. 76 (right to perfect a homestead claim); *United States* v. *Classic*, 313 U. S. 299 (right to vote in federal elections); *Logan* v. *United States*, 144 U. S. 263 (right to be secure from unauthorized violence while in federal custody); *In re Quarles*, 158 U. S. 532 (right to inform on violations of federal law). Cf. also *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Hague* v. *CIO*, 307 U. S. 496, 512–513 (opinion of Roberts, J.); *Collins* v. *Hardyman*, 341 U. S. 651, 660.

[19] We include these remarks only to show that the Senator clearly intended § 241 to cover Fourteenth Amendment Rights.

We conclude, therefore, that it is incumbent upon us to read § 241 with full credit to its language. Nothing in the prior decisions of this Court or of other courts which have considered the matter stands in the way of that conclusion.[20]

The present application of the statutes at issue does not raise fundamental questions of federal-state relationships. We are here concerned with allegations which squarely and indisputably involve state action in direct violation of the mandate of the Fourteenth Amendment—that no State shall deprive any person of life or liberty without due process of law. This is a direct, traditional concern of the Federal Government. It is an area in which the federal interest has existed for at least a century, and in which federal participation has intensified as part of a renewed emphasis upon civil rights. Even as recently as 1951, when *Williams* I was decided, the federal role in the establishment and vindication of fundamental rights—such as the freedom to travel, nondiscriminatory access to public areas and nondiscriminatory educational facilities—was neither as pervasive nor as intense as it is today. Today, a decision interpreting a federal law in accordance with its historical design, to punish denials by state action of constitutional rights of the person can hardly be regarded as adversely affecting "the wise adjustment between state responsibility and national control . . . ." *Williams* I, 341 U. S., at 73 (opinion of Frankfurter, J.). In

[20] This Court has rejected the argument that the constitutionality of § 241 may be affected by undue vagueness of coverage. The Court held with reference to § 242 that any deficiency is cured by the requirement that specific intent be proved. *Screws* v. *United States*, 325 U. S. 91. There is no basis for distinction between the two statutes in this respect. See *Williams* I, 341 U. S., at 93–95 (DOUGLAS, J.).

any event, the problem, being statutory and not constitutional, is ultimately, as it was in the beginning, susceptible of congressional disposition.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court except insofar as the opinion relies upon *United States* v. *Williams*, 341 U. S. 58; *United States* v. *Williams*, 341 U. S. 70; and *Williams* v. *United States*, 341 U. S. 97.

APPENDIX.

Remarks of Senator Pool of North Carolina on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611–3613):

Mr. POOL. Mr. President, the question involved in the proposition now before the Senate is one in which my section of the Union is particularly interested; although since the ratification of the fifteenth amendment, which we are now about to enforce by appropriate legislation, other sections of the country have become more or less interested in the same question. It is entering upon a new phase of reconstruction; that is, to enforce by appropriate legislation those great principles upon which the reconstruction policy of Congress was based.

I said upon a former occasion on this floor that the reconstruction policy of Congress had been progressive, and that it was necessary that it should be progressive still. The mere act of establishing governments in the recently insurgent States was one thing; the great principles upon which Congress proposed to proceed in establishing those governments was quite another thing, involving principles which lie at the very foundation of all that has been done, and which are intimately connected with all the results that must follow from that and from the legislation of Congress connected with the whole subject.

Mr. President, the first thing that was done was the passage of the thirteenth amendment, by which slavery in the United States was abolished. By that four millions of people were taken out from under the protecting hand of interested masters and turned loose to take care of themselves. They were turned loose and put upon their own resources in communities which were imbued with prejudices against them as a race, communities

which for the most part had for years past—indeed from the very time when those who are now in existence were born—been taught and had instilled into them a prejudice against the equality which has been attempted to be established for the colored citizens of the United States.

Mr. President, the condition which that thirteenth amendment imposed on the late insurrectionary States was one which demanded the serious consideration and attention of this Government. The equality which by the thirteenth, fourteenth, and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of the prejudices which had theretofore existed, but it has raised against them still stronger prejudices and stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people, weak, ignorant, and poor. Those among the white citizens there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is for that reason not only necessary for the freedmen, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction.

We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purposes, of intimidating and coercing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be

resorted to on the part of those who are oppressed. Sir, the time will come when retaliation will be resorted to unless the Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedom, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. It speaks of "the right of citizens to vote." It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can individuals abridge it with impunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. If our legislation is to apply only to the States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must apply to individuals. A State might attempt to contravene that provision of the Constitution by passing some positive enactment by which it would be contravened, but the Supreme Court would hold such enactment to be unconstitutional, and in that way the State would be restrained. But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It

cannot—because the courts would prevent it—by positive legislation, but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.

The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. The civil rights bill recognized all persons born or naturalized in the United States as citizens, and provided that they should have certain rights which were enumerated. They are, "to make and enforce contracts, to sue, be made parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property," and to "the full and equal benefit of all laws and proceedings for the security of person and property."

The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, "to subject, or cause to be subjected, any citizen to the deprivation of any of the rights secured and protected" by the act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. And so, under the fourteenth amendment to the Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article."

There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer to execute any law of a State by which he trespasses upon any of these rights of the citizen it operates upon him as a citizen, and not as an officer. Why can you not just as well extend it to any other citizen of the country?

It is, in my judgment, incumbent upon Congress to pass the most stringent legislation on this subject. I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of

these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.

There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in section two of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. I believe the language of the Senate bill is sufficiently large and comprehensive to embrace any other class of officers that might be charged with any act that was necessary to enable a citizen to perform any prerequisite to voting. But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this

right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the fifteenth amendment.

But, sir, there is a great, important omission in this bill as well as in that of the House. It seems not to have struck those who drew either of the two bills that the prevention of the exercise of the right of suffrage was not the only or the main trouble that we have upon our hands. Suppose there shall be an organization of individuals, or, if you please, a single individual, who shall take it upon himself to compel his fellow citizens to vote in a particular way. Suppose he threatens to discharge them from employment, to bring upon them the outrages which are being perpetrated by the Kuklux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. It seems to me it is necessary that we should legislate against that. That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books for taxation or of depositing the ballot in the box. I think the bill cannot be perfected to meet the emergencies of the occasion unless there be a section which meets that view of the case.

The Senator from Indiana [Mr. Morton] asks whether I have drawn an amendment to that effect. I have, but I cannot offer it at this time, for the simple reason that there is an amendment to an amendment pending.

Mr. MORTON. Let it be read for information.

Mr. POOL. It has been printed, and I send it to the desk to be read for information.

The Chief Clerk read the amendment intended to be proposed by Mr. Pool, as follows:

"Insert after section four of the Senate bill the following sections:

"SEC. 5. *And be it further enacted,* That it shall be unlawful for any person, with intent to hinder or influence the exercise of the right of suffrage, as aforesaid, to coerce or intemidate, or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory. Any person violating the provisions of this section shall be held guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court: the fine not to exceed $1,000, and the imprisonment not to exceed one year.

SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, and on conviction thereof shall be fined and imprisoned; the fine not to exceed $5,000 and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 7. *And be it further enacted,* That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States, as hereinafter provided, for violations of this act, and on conviction thereof shall be punished for the same

with such punishments as are attached to like felonies, crimes, and misdemeanors by the laws of the State in which the offense may be committed.

"Strike out section twelve and substitute therefor the following:

"*And be it further enacted*, That the President of the United States, or such person as he may empower for that purpose, may employ in any State such part of the land and naval forces of the United States, or of the militia, as he may deem necessary to enforce the complete execution of this act; and with such forces may pursue, arrest, and hold for trial all persons charged with the violation of any of the provisions of this act, and enforce the attendance of witnesses upon the examination or trial of such persons."

. . . . .

Mr. POOL. The Senator from Indiana asked if I had an amendment prepared which met the view of the case I was presenting in regard to the compelling of citizens to vote in a particular way. The first section of the amendment which I have offered uses this language:

"That it shall be unlawful for any person with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory."

But, Mr. President, there is another view which seems to have been lost sight of entirely by those who have drawn both the House bill and the bill now pending before the Senate, and from which we apprehend very much danger. It is this: the oppression of citizens because of having voted in a particular way, or having voted at all. It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by

their employers. They may be subjected to outrages of various kinds because they have participated in an election, and cast their votes in a particular way. That is not done for the purpose of punishment so much as for the purpose of deterring them from voting in any succeeding election, or from voting in a way that those who perpetrate these outrages do not desire them to do. I find that branch of the subject is entirely left out of view in the bill.

There is another feature of my amendment which I deem of some importance. It is this:

"That if in the act of violating any provision in either of the two preceding sections any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States."

I think the most effective mode of preventing this intimidation and these attempts at coercion, as well as the outrages which grow out of these attempts, would be found in making any offense committed in the effort to violate them indictable before the courts of the United States. As was said before, in the discussion of the Georgia question in the Senate, the juries in the communities where these outrages are committed are often composed of men who are engaged in them, or of their friends, or of those who connive at them, or of persons who are intimidated by them, and in many instances they dare not bring in a true bill when there is an attempt to indict, or if a true bill be found, they dare not go for conviction on the final trial. It is for that reason that I believe it will be better, it will be the only effective remedy, to take such offenders before the courts of the United States, and there have them tried by a jury which is not imbued with the prejudices and interests of those who perpetrate the crimes.

These are the principal features of the amendment which I have drawn in the effort to perfect this bill; and there is another one to which I will call the attention of the Senate. It is that in regard to calling out the military forces of the United States. I find that in the civil rights bill, as in the bill which has been introduced by the Senate Judiciary Committee, the President is authorized, either by himself or by such person as he may empower for that purpose, to use the military forces of the United States to enforce the act. There in both instances it stops. It has been objected to here that the expression, "or such other person as he may empower for that purpose," should not be in the bill; that it may be subject to abuse. I think it would have no good effect to keep that language in. The President may send his officers and he may empower whomsoever he pleases to take charge of his forces without any such provision.

But there is a use for these forces which seems not to have been averted to in either the civil rights bill or in the bill that is now pending before the Senate. It is the holding of these offenders for examination and trial after they are arrested. Their confederates, if they are put in the common prison of the State, will in nine cases out of ten release them. But more important still is it to use these forces to compel the attendance of witnesses; for a subterfuge resorted to is to keep witnesses away from the trial. In many instances witnesses are more or less implicated in the commission of the offense. In other cases the witnesses are intimidated and cannot be obtained upon the trial. So in the amendment which I have prepared I have proposed that these forces may be used to enforce the attendance of witnesses both upon the examination and the trial. My purpose in introducing this was to perfect the Senate bill. I think, as I said yesterday, that that bill is liable to less objection than the House bill. I think it is more efficacious in its

provisions. I think it is better that the Senate should direct its attention to perfecting that bill, in order that it may be made, when perfected, a substitute for the bill that came from the House.

That much being said upon the purpose of perfecting the bill and making it efficacious, I have very little more to say. I did not intend when I rose to say much upon the general power, which has been questioned here, to pass any law at all. I think it is better to do nothing than to do that which will not have the proper effect. To do that which will not accomplish the purpose would be worse than doing nothing at all. That the United States Government has the right to go into the States and enforce the fourteenth and fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this Union. I think this question will come time and again as years pass by, perhaps before another year, in different forms before the Senate. It is well that we should deal with it

now and deal with it squarely, and I hope that the Senate will not hesitate in doing so.

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.

Upon that ground the Republican party must stand in carrying into effect the reconstruction policy, or the whole fabric of reconstruction, with all the principles connected with it, amounts to nothing at all; and in the end it will topple and fall unless it can be enforced by the appropriate legislation, the power to enact which has been provided in each one of the great charters of liberty which that party has put forth in its amendments to the Constitution. Unless the right to enforce it by appropriate legislation is enforced stringently and to the point, it is clear to my mind that there will be no efficacy whatever in what has been done up to this time to carry out and to establish that policy.

I did not rise, sir, for the purpose of arguing the question very much in detail. I did not rise for the purpose of making any appeals to the Senate; but more for the purpose of asserting here and arguing for a moment the general doctrine of the right of the United States to intervene against individuals in the States who attempt to contravene the amendment to the Constitution which we are now endeavoring to enforce, and for the purpose of calling attention to the defects in the bill and offering a remedy for them.